SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 615

GEORGE T. NISHIDA and JAMES E. NISHIDA, d/b/a Hilo Dairy Company of Kauai, RYOJU SOKEI, d/b/a Sokei Dairy, and FRED L. WALDRON, LIMITED,
Petitioners,

vs.

E. I. DU PONT DE NEMOURS & COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROGER E. BROOKS,
923 20th Street, N. W.,
Washington 6, D. C.

C. NILS TAVARES,
Alexander & Baldwin Building,
Honolulu, Hawaii

PRATT, TAVARES & CASSIDY,
Alexander & Baldwin Building,
Honolulu, Hawaii

KASHIWA & KASHIWA,
401 Trusteo Building,
Honolulu, Hawaii

WILLIAM G. BURGIN, JR.,
516 North Second Avenue,
Columbus, Mississippi,
Of Counsel

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II. The Circuit Court's ruling that the Federal Food, Drug and Cosmetic Act was immaterial in a jury case in which the trial court failed to inform the jury by proper instructions as to the extent of the duty to warn all foreseeable users and the general public of the dangerous qualities of an article sold in interstate commerce imposed by that Act on the manufacturer thereof constituted a failure to give full effect to the scope and policy of the Act, which should be corrected by this court 39

III. The Circuit Court's ruling that the Act was immaterial in a jury case in which the trial court failed to inform the jury by proper instructions that the Act imposes an absolute liability upon a manufacturer or distributor in interstate commerce of an unlabeled dangerous article, in connection with an instruction in general terms only that the petitioners were entitled to recover unless the chain of causation was broken by an intervening cause, constituted grievous error since the jury could not properly evaluate the alleged intervening cause without knowing that such violation constituted negligence per se 39

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IV. The Circuit Court's holding that petitioners were foreclosed from raising the question of error in the trial court's refusal to give any of the 20 written instructions requested by petitioners, except a portion of one of them, by the state of the record, which indicated that technically the exceptions of petitioners were made after the jury had retired, constituted a miscarriage of justice through failure to construe Rules 46 and 51, Federal Rules of Civil Procedure, together 40

V. This case presents a question of first impression, whether the Federal Food, Drug, and Cosmetic Act creates a new and independent cause of action based on failure by a manufacturer or distributor of articles in interstate commerce adequately to perform the duty of placing labels on his product or labeling so adequately to warn all foreseeable users of the potential dangers of using the product for the purposes for which it is manufactured or distributed 41

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No.

GEORGE T. NISHIDA and JAMES E. NISHIDA, d/b/a Hilo Dairy Company of Kauai, RYOJU SOKEI, d/b/a Sokei Dairy, and FRED L. WALDRON, LIMITED,
Petitioners,

VS.

E. I. DU PONT DE NEMOURS & COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

George T. Nishida and James E. Nishida d/b/a Hilo Dairy Company of Kauai, Ryoju Sokei, d/b/a Sokei Dairy, and Fred L. Waldron, Limited, a Hawaii corporation, pray that a writ of certiorari issue to review a decision and judgment of the Court of Appeals for the Fifth Circuit entered in the cases of

George T. Nishida and Jamse E. Nishida, doing business as Hilo Dairy Company of Kauai, a copartnership,
Ryoju Sokei, doing business as Sokei Dairy,
Fred L. Waldron, Limited,
Appellants

VS.

E. I. du Pont de Nemours & Company, a corporation,
Appellee.

OPINIONS BELOW

The order of the District Court for the Northern District of Mississippi denying appellants' motions for new trial (R. 106, 502), Appendix 13a, has not been reported. The opinion of the Court of Appeals for the Fifth Circuit (R. 558) is reported under the title *Hilo Dairy Co. of Kauai* v. *E. I. Du Pont De Nemours & Co.*, and *Nishida* v. *E. I. Du Pont De Nemours & Co.*, (Sept. 9, 1957) at 245 F. 2d (Adv. Shts. No. 4) 768, Appendix 1a, 12a.

JURISDICTION

The judgment of that Court was entered on June 20, 1957. A petition for rehearing was denied on August 16, 1957.

The jurisdiction of the United States District Court for the Northern District of Mississippi was invoked under Section 1332, Title 28, U. S. Code, June 25, 1948, c. 646, 62 Stat. 930; and under the Federal Food, Drug, and Cosmetic Act, Chapter 9, Title 21, U. S. Code, June 25, 1938, c. 675, 52 Stat. 1040, and Sec. 1331 U. S. C. A. Title 28, June 25, 1948, c. 646, 62 Stat. 930.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1), June 25, 1948, ch. 646, Sec. 1, 62 Stat. 928.

QUESTIONS PRESENTED

I

Whether or not the affirmance (R. 572) by the Fifth Circuit Court of Appeals of the judgment below based largely upon the *Ladner* decision (*E. I. du Pont de Nemours & Co.* v. *Ladner*, 221 Miss. 378, 73 So. 2d 240) had the effect of according to a State Court decision a controlling construction of a federal act, thereby violating the rule that "When a federal act condemns an

act as unlawful the extent and nature of the legal consequences of the condemnation . . . are . . . federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield." *Picking* v. *Pennsylvania R. Co.*, 3rd Cir. (1945) 151 Fed. 2d 240, 251, quoting *Sola Elec. Co.* v. *Jefferson Co.*, 317 U. S. 173, 176.

II

Whether the Circuit Court of Appeals, in holding that "Some of the instructions (R. 203-222) (Appendix 14a-29a) requested, such as those involving violations of the Federal Food, Drug and Cosmetic Act . . ., had no materiality in view of the instruction that the verdict should be for the appellants unless the chain of causation was broken", (R. 570) misinterpreted the Act and failed to give effect to the full scope and policy of that Act, which sets up the standards and policy of adequacy of warning and information required to be given to the general public and ultimate consumer through labeling and otherwise by a manufacturer of a dangerous article sold in interstate commerce, and failed to afford to petitioners the right, to which they were entitled, of having the jury pass upon the adequacy of the warning given by the respondent after it had violated the Act, in the light, not only of the cautious language, and the immediate circumstances of the handing by Armstrong to Magnolia of the letter of July 31, 1951, (Ex. 35, R. 290) but of all of the other preceding and subsequent relevant circumstances, under proper instructions as to the duty owed by the manufacturer, not only to the immediate purchaser or receiver of the product, but to the general public and ultimate consumer.

III

Whether the Fifth Circuit Court, in affirming the trial court's judgment, (R. 572) overlooked and failed to give effect to certain rights in the petitioners created by the Federal Food, Drug, and Cosmetic Act, of which they were deprived by the trial court's action in refusing to give all but a portion of one of the petitioners' requested jury instructions, in that the petitioners were entitled to have the jury know, but the jury were not informed: (1) that in shipping tri solvent in interstate commerce for use in the manufacture of feed for cattle, without labeling the same so as to warn the public that feeding the same, or at least that feeding more than a little over two (2) pounds per day per animal, might be poisonous to the cattle, the respondent had violated the Federal Food, Drug, and Cosmetic Act; (2) that such a violation constituted negligence *per se* as to any person suffering damages from products manufactured by Magnolia with respondent's solvent so shipped in interstate commerce to Magnolia; (3) that the jury had the right and duty to determine whether that negligence was the proximate cause or a concurrent and contributing proximate cause of the petitioners' damages; and (4) that, in determining whether there had been a break in that chain of causation sufficient to constitute an intervening cause exonerating respondent, the jury should consider, among other things, respondent's duties and responsibilities under the Act, not only to Magnolia which used respondent's solvent that caused the feed to be poisonous to cattle, but to the general public and ultimate consumer of Magnolia's products manufactured with that solvent.

IV

Whether, in the light of Rules 46 and 51, Federal Rules of Civil Procedure, construed together, when the trial court fails to rule on requests of a party for instructions until after the jury retires and the ruling refusing all instructions as offered is then made and is promptly excepted to by the party offering the same, such party is foreclosed from raising the question of error in such refusal on a motion for a new trial and on appeal.

V

Whether the Federal Food, Drug, and Cosmetic Act creates a new and independent federal civil cause of action based on failure by a manufacturer or distributor of articles sold or distributed in interstate commerce to adequately perform the duty of placing labels on his product or labeling so as to adequately warn all forseeable users of the potential dangers of using the product for the purposes for which it is manufactured or distributed.

STATUTES INVOLVED

Federal Food, Drug, and Cosmetic Act, June 25, 1938, c. 675, Sec. 1, 52 Stat. 1040. (Pertinent sections quoted at pages 48-50.)

Rules 46 and 51, F. R. C. P., Title 28 U. S. C. A.

STATEMENT OF CASE

The three cases constituting this petition, consolidated below for convenience of trial and on appeal, involve the recovery of damages for injuries suffered in the Territory of Hawaii by petitioners by reason of the feeding of tri-extracted soybean oil meal to cattle. At all times relevant to these actions, the petitioners (a) George T. Nishida and James E. Nishida,

doing business as the Hilo Dairy Company of Kauai, a co-partnership (Dep.* Nishida p. 9), hereinafter called Nishida, and (b) the petitioner, Ryoju Sokei, doing business as Sokei Dairy, hereinafter called Sokei, resided and owned and operated dairies on the Island of Kauai, Territory of Hawaii, hereinafter called the Territory (Deps. Nishida pp. 9, 11, Sokei p. 150). They were old customers of the other petitioner herein Fred L. Waldron, Limited, a Hawaii corporation (Dep. Waldron 457), hereinafter called Waldron, a wholesaler and retailer for many years of cattle feed (Deps. Luck 423-5; Waldron 457-8; Parker 573-4), and in December, 1951, in the case of Nishida (Dep. Nishida 14, 15), and in December, 1951 and January and February, 1952, in the case of Sokei (Dep. Sokei 154, 156, 158), purchased 300 sacks and 380 sacks, respectively, of soybean oil meal for cattle feed from Waldron, depending, as previously, exclusively on Waldron's skill and judgment, and not designating the brand or type of meal desired (Deps. Nishida 7, 88, 89, Sokei 155, 211).

This meal was shipped to Waldron in interstate commerce from the manufacturer thereof, Magnolia Soy Products Company, hereinafter called Magnolia, a Mississippi corporation from its mill at Greenville, Mississippi (Dep. Luck 426-7), and had been manufactured under the trichloroethylene extraction process. The solvent trichloroethylene, sometimes in the record and hereinafter called "tri", used in the manufacture of such meal, was manufactured and sold and delivered through interstate commerce to Magnolia by E. I. du Pont de Nemours & Company, defendant respondent, hereinafter called du Pont (R. 45, 154).

---

* NOTE: Dep. refers to the deposition of the person named, returned by the Circuit Court of Appeals to, and on file in, the trial court.

The petitioners Nishida and Sokei and the other dairymen who purchased this meal from Waldron had not known of Magnolia prior to the receipt of delivery at the designated ports in Hawaii of the original unopened sacks each having attached when received the identification tags of Magnolia and did not know of the process of manufacture used by Magnolia (Dep. Luck 446, 447); did not know that du Pont manufactured tri, had no knowledge of the use of tri in manufacturing soybean meal, and had not had any previous business relationship with du Pont (Dep. Luck 453).

The meal so purchased by them was fed by Nishida and Sokei to the milking cows and cattle on their respective dairies, with the result that many of the animals died and others became violently ill, (Deps. Nishida 25, Sokei 166).

Respondent admits the manufacture of tri and its sale and delivery through interstate commerce to Magnolia for use in manufacturing soybean oil meal for feed for cattle (R. 45).

Nishida and Sokei sued Waldron for the damages so resulting, and all three of them sued du Pont in the present cases (Dep. Waldron 458, 459, 464, 465).

In 1951 Waldron ordered for purchase 200 tons of soybean oil meal from The Brode Corporation (hereinafter called "Brode"), a Tennessee corporation in Memphis. Brode placed this order with Magnolia with instructions to ship the meal from the mill at Greenville, Mississippi, to Waldron at designated Hawaii ports (Dep. Luck 426-7, 429) and the meal received by Nishida and Sokei was part of this Waldron order. The remainder of the order was sold by Waldron to other purchasers in Hawaii for feed for cattle, who fed the same to their dairy cattle with results

similar to those experienced by Nishida and Sokei (Deps. Waldron 464-5; Luck 425-6, 435-8, 440-441, 444-5, 454; Souza 482-492; Imaizumi 494-500; Shiroma 502-8; Cambra 510-514; Shimabukuro 516-523; Hirowatari 525-9; Omori 531-4; Weight 539-542, 544-561, 565; Parker 575-585; Olim 394-406; Parker 413-416; Young 419-421).

The trial court in the forepart of its instructions to the jury said:

> "Therefore, there are to my mind, and I think in any reasonable man's mind, certain things that are definitely and specifically established by the evidence in this case. That is that du Pont did hold out to these people [Magnolia] that they could manufacture trichloroethylene extracted soy bean oil [meal] and it would be safe for cattle feed; that they did so manufacture, that in the processes of trade certain of their products marketed 'Magnolia Soybean Meal' through a broker in Memphis, a Mr. Brode, were eventually sold to Waldron, Limited, in Honolulu by Waldron, Limited, to Sokei and Hilo Dairies, and that as a result of the feeding of that meal these cattle died. I do not think any reasonable man could come to any other conclusion about that" (R. 483).

Because of the importance thereof to a proper understanding of the complexity of the three consolidated cases and of the necessity for the requested jury instructions (R. 203-222) denied by the court, we next detail, in greatly abbreviated form considering the fact that the transcript and depositions cover three consolidated cases with several thousands of pages of depositions, transcript and exhibits, the highlights of the evidence which led the trial judge to the above-quoted conclusions.

Magnolia, a Mississippi corporation having its principal office in Greenville, Mississippi, was incorporated in January, 1951, organized Feb. 7, 1951 (R. 255), and from March 1951 until sometime in January 1952 (R. 292) was engaged in producing soybean oil and soybean oil meal by a chemical extraction process, using tri as the solvent, and selling the meal for cattle feed.

L. L. Ford, Lyman Reed and J. M. Warren (hereinafter called, respectively Ford, Reed and Warren) are and since Magnolia's incorporation have been the owners of its capital stock and its officers and directors. Prior to January 23, 1951, they were partners doing business as L. L. Ford Associates (R. 255, 262, 268, 298, 303, 305, 332, 333).

In June or July, 1950, Ford Associates began construction at Greenville (R. 255) of a soybean oil mill for producing oil and meal by the process and for the purposes above stated. The mill and certain real estate and other property valued at approximately $500,000.00 were conveyed in February, 1951 to Magnolia (R 288-9). The mill started production about March 15, 1951 and continued with certain interruptions until January 10, 1952 (R. 276, 292, 294). About that date it was closed and thereafter dismantled.

During 1949 and for several years prior, L. L. Ford engaged in the business of designing and building solvent extraction plants (R. 284). He had up to the time of the construction of the Magnolia plant dealt with equipment designed principally for use in manufacturing soybean oil and meal, with the petroleum product known as hexane, a volatile extraction solvent. By Iowa State College he was referred to du Pont for information on the properties of trichloroethylene, a chemical solvent manufactured by du Pont for processing soy-

beans (R. 284). Du Pont claimed trichloroethylene to be non-inflammable, or almost so, therefore less hazardous than hexane and a safe solvent for the processing of soybean meal for feed for cattle (R. 311, 317). As a result of his inquiry he met early in 1950, T. J. Milligan, an agent of du Pont who told Ford of his Company's interest in developing mills larger than those theretofore constructed for the use of trichloroethylene. On this point Ford testified:

> "Mr. Milligan told me that if I built a mill that would use trichloroethylene that the du Pont Company would furnish me any assistance in engineering, developing and designing possible for them to offer me and they did * * *. Mr. Milligan paid me a visit on at least two occasions in Atlanta." (R. 285).

Correspondence and further conversations developed between T. J. Milligan, representing du Pont on the one side, and L. L. Ford, Ford Associates, Lyman Reed and the Davidson-Kennedy Company, on the other (R. 272, 276).

The last mentioned was represented by Allen Jackson and O. H. Sale. Allen Jackson, through his company, had worked with Ford in designing and manufacturing extraction equipment and Davidson-Kennedy did make most of the machinery and other items for the Magnolia plants. The extent of the interest of du Pont in the construction of a large mill (R. 284) by L. L. Ford Associates, the aid provided and the high degree of supervision given by du Pont are established by 20 exhibits, some with numerous attachments, Nos. 20 to 48, both inclusive.

Exhibit 20, letter of du Pont's T. J. Milligan of August 11, 1950, with its enclosures, addressed to L. L.

Ford is of vital importance for on the representations made in the letter and in the appendix enclosed therewith the decision was made by L. L. Ford and his associates to proceed with the construction of the plant for use of trichloroethylene as an extraction agent.

On or about August 8, 1950 (R. 272) T. J. Milligan was at Greenville, Mississippi, and in a conversation there held with L. L. Ford, minimized and brushed aside questions asked him concerning statements received by Ford and J. M. Warren about the toxicity of trichloroethylene extracted meal. Ford testified with respect to the conversation that he, Ford, said, "I told him [Milligan] that we were at a point at the time to where we could back up, that we had not gotten so far that we could not convert [meaning that at that time the plant was convertable into one using an extraction agent other than trichloroethylene]. He told us there was nothing to the rumors we'd heard and I asked him to give me a letter to that effect. * * * I told him what had been said about it and Mr. Milligan told me it was all rumors and there was nothing to it. * * *, nothing to any information we had that soybean meal made with trichloroethylene was toxic, that was strictly rumor and there was nothing to it. He said they had investigated and offered this product in some of their trade papers and they wouldn't recommend it unless it was all right. I asked him for a letter to that effect and along with those other things he read this letter." (R. 296, 297-298).

As a result of the conversation T. J. Milligan did write under date of August 11, 1950, Exhibit No. 20, saying in part: "Several times you have mentioned that certain parties in the south are conducting a 'smear campaign' maligning the quality of tri-

extracted soybean meal and oil and casting doubts on the stability of trichloroethylene. We feel that you should know the true facts about several instances in the history of tri-extraction which have become distorted as news of these occurrences passed from person to person in the oilseed industry. Accordingly, we are enclosing a brief discussion of tri-extracted oil and meal quality which also outlines our experience with corrosion in tri-extraction plans. This background should enable you to satisfactorily answer any questions that may arise as a result of the disparaging reports that are now being circulated." Two paragraphs in the appendix of August 11, 1950, a part of Exhibit 20, are significant:

> "It has recently been brought to our attention that an unidentified hemorrhagic cattle disease, having symptoms virtually identical to those described in the Stockman and Cornell reports, has been encountered among cows in both Iowa and Colorado. Feeding practice on the farms where the disease has been encountered was investigated as a possible clue to the cause and, as might be expected, varied widely from farm to farm. Some of the affected animals had been on grass, without supplemental rations, for 45 days prior to onset of symptoms. Others were receiving soybean meal plus hay, with or without supplemental minerals and vitamins added. On farms where soybean meal was employed, some were feeding expeller or hexane-extracted meal, others were feeding trichlorothylene extracted meal. There is, of course, the possibility that all animals reported suffering from this hemorrhagic condition did not actually have the same disease; however, we have been told that the symptoms appear identical.
>
> An important feature of the occurrence of the disease in Iowa and Colorado is the fact that in

several cases a single meal shipment was divided among a number of farms with the disease occurring on only one. On the farm where the disease occurred, however, several animals were lost. This is one of the chief factors which has led the soybean processors, veterinarians, and university veterinary faculties with whom we have discussed these cases to conclude that the soybean meal was probably not the cause of the disease."

Also enclosed with the letter of August 11, 1950 of T. J. Milligan, (Ex. 20) was a mimeographed copy of a document entitled "Trichloroethylene Soybean Extraction", dated December 27, 1949. At page 9 we find set out in the entitled copy:

"Today, trichlorethylene is plentiful and will remain so. *The du Pont Company, with its faith in the process is actively promoting its use.* (Emphasis supplied.) We are happy to say that within the past six months a number of 25 to 50-tons capacity trichlorethylene plants have been contracted for, and we believe that we will be able to report in the not too distant future that one or more plants with an individual capacity of 100 tons or more have been placed under construction."

And at page 11:

"In considering this process, we also respectfully suggest that a company with the national prominence and reputation of E. I. du Pont de Nemours and Company, Inc. can scarcely risk recommending a process such as trichlorethylene extraction unless we are absolutely convinced as to the quality and marketability of the product that it will produce and the cost at which it will operate." (Emphasis supplied.)

A copy of the Stockman Report (Stockman, Sir Stewart), Jour. Compar. Path. and Ther., 29 (1916), No. 2 pp. 95-107, as extracted in Exp. Sta. Rec. 36 (1917) p. 580 was enclosed in the letter of Milligan of August 11, 1950, Exhibit 20, and Milligan stated with regard to the report that it "actually showed that trichloroethylene itself was not the poisonous substance affecting the cattle," and other experiments "failed to reveal the cause of the disorder" in cattle. In fact, the Stockman Report recommends against the feeding of trichloroethylene meal to cattle. It is well to quote what Dr. Vollertsen wrote in the Cornell Report with regard to the Stockman Report:

> "In the spring of 1916 there occurred in the south of Scotland cases of poisoning among cattle fed concentrate containing trichloroethylene extracted soya bean meal. Of sixty-seven cows showing symptoms of poisoning fifty-four died. This number represented 10% of the total number of animals receiving the ration and the distribution was on nine farms. The average time from beginning of feeding to onset of symptoms was sixty-four days. The average amount of soya bean meal consumed was 194 pounds per cow.
>
> The symptoms consisted of high temperature, 105° F. to 109° F., refusal to eat, bleeding from nostrils, colic, intestinal hemorrhage and diarrhea, lessening and cessation of lactation.
>
> Autopsy disclosed pin point to massive hemorrhage throughout the subcutaneous tissues and muscles, especially the hind quarter, the mucous membrane of the gastro-intestinal tract with marked ulceration of the small intestine, peritonitis but little evidence of damage to the other organs.
>
> Stockman in his investigation and experimental studies concluded that tricloroethylene when fed

in comparatively large doses, one to three ounces daily for a long period was not poisonous, and that a vitamin deficiency did not exist. When soya bean meal is extracted with trichloroethylene, a poisonous substance is formed and therefore this method of extraction should be discontinued."

The Cornell Report mentioned above as enclosed by T. J. Milligan to L. L. Ford was an experiment conducted at Cornell University in 1937 and 1939. The record shows that du Pont defrayed the cost of the experiment and it was conducted under the direction of Dr. Vollertsen, an employee of du Pont. On the basis of that report du Pont set out in the mentioned appendix that quality soybean meal could be produced if the meal were heated to 120 degrees centigrade. We know from the testimony of Dr. Raymond T. Vaughn, set out in part, post, pages 33-34, that the degree of heat is a factor only to the extent that the higher the temperature the more quickly the reaction, forming the poisonous substance from trichloroethylene and soybeans, takes place.

The Cornell Report at page 5 shows that the trichloroethylene processed meal used in the experiment was fed to one group of cows at the rate of 1.4 to 2.7 pounds per day for a year to each animal and that with another group (at page 6 of the report), "The year's intake of trichloroethylene extracted soybean meal ranged from 539 to 755 pounds or 1.5 to 2 pounds per day.", by each animal.

We find also in the appendix (Ex. 20) the statement, *supra* p. 12, respecting the outbreak in Iowa and Colorado, the outbreak brought out by Ford during the heretofore described conversation of August 8, 1950 between T. J. Milligan and L. L. Ford. Here again we

see du Pont, through its representation, making light of an outbreak of the hemorrhagic disease, writing that a single shipment of meal was divided among several farms with the hemorrhagic disease occurring on only one, and concluding, "This is one of the chief factors which has led the soybean processors, veterinarians, and university veterinary faculties with whom we have discussed these cases to conclude that the soybean meal was probably not the cause of the disease." *Supra*, p. 13.

With his letter of October 21, 1949, Ex. 28, to Lyman Reed, T. J. Milligan enclosed a copy of the Cornell Report which he said, "I am certain will answer some of the questions in your mind, and also refute some of the behind-the-hand whispering you may have heard."

Du Pont's representatives visiting the plant at Greenville were, in addition to T. J. Milligan and R. Stuart Armstrong, Mr. F. G. Low (referred to in the record as F. G. Loweron), Mr. Hamilton and Mr. Schwartz (R. 275). These representatives, according to L. L. Ford, had sketches, bulletins, specifications, etc. and supervised the installation of equipment. The construction and operation of the plant and the directions of du Pont in this regard were carried out by Magnolia officers "as nearly as possible directly to the letter" (R. 275). Not only were the technical bulletins, charts, etc. enclosed with the letter of August 11, 1950, Exhibit 20, sent to L. L. Ford, they were also sent to Davidson-Kennedy to assist that Company (R. 276) in manufacturing the equipment for the Magnolia plant and that Company fully carried out du Pont's directions. During the entire operation of the Magnolia plant all trichloroethylene used was purchased exclusively from du Pont (R. 277).

The matter of directions and warnings are of such outstanding importance it is necessary to further quote from the testimony of L. L. Ford:

In reply to the question, "State whether or not Magnolia Soy Products Company in the operation of its plant at Greenville, Mississippi, which manufactured soybean meal by the tri-solvent process, whether in the operation of that plant you followed the directions given by du Pont for the operation of your plant?"

L. L. Ford answered, "Right to the letter" (R. 303).

On August 3, 1951, R. Stuart Armstrong delivered to Lyman Reed and L. L. Ford the letter of C. B. Shepherd of July 31, 1951, Ex. 35, (R. 283, 402). It is this letter that du Pont contended constituted a sufficient warning to Magnolia to make no further sales of tricholoroethylene processed meal for feed for cattle. Relative to the conversation which took place on the delivery of that letter the testimony of Ford is:

"I read the letter [C. B. Shepherd, July 31, 1951, Ex. 35] (R. 288) and became very much disturbed. I told Mr. Armstrong, here you've let me spend $500,000.00 building this mill and now you tell us we can't use it to manufacture feed, and he said, the reason I brought it personally was because I didn't want you to get excited about it. I told him 90% of our business is cattle feed and we can't sell a car a year other than for cattle feed and now you tell us not to sell any more for cattle feed, and he said, 'I didn't say that', * * *." Anyway, I asked him, does the Du Pont Company know we can't operate our mill and have built one here that cost $500,000.00? If we can't sell it for cattle feed we can't operate it. Did Du Pont tell us to shut down? Do they have evidence?" To this Armstrong replied:

"No, there isn't any evidence conclusive; there's rumors circulated from time to time. All through these letters they dispelled those rumors and said there wasn't anything to them" (R. 289).

At this point the plaintiffs introduced Exhibit No. 35, the mentioned letter of July 31, 1951 of C. B. Shepherd (R. 290).

L. L. Ford's testimony continues on this subject. "We took the position they knew what they were talking about. We had the mill closed down at the moment and later in the year we ordered from the Du Pont Company a shipment of trichloroethylene to extract oil from soybeans to be used for cow feed. I told Mr. Armstrong that we couldn't operate unless we did sell it for cow feed, and he knew it was going to be used for that. I will give you the date, November 21, 1951. The Du Pont Company drew a draft on my Company for $3718.00 for 52 drums. * * *. They did not anywhere on the invoice or accompanying letter in any way say this could not be used as they recommended it all of the time during the years past" (R. 291, 292).

In further reference as to what took place at the time of delivery on August 3, 1951, of the mentioned letter of July 31st, Ford referring to Armstrong said, "He expressed the opinion so far as he knew there wasn't any evidence that trichloroethylene meal had anything to do with cattle losses" (R. 293). To the following question, "When you told him you couldn't operate your plant without selling your feed for cattle food, what did he say to you at that time?" Ford answered, "I asked him point blank if Du Pont would recommend our closing the plant down because we

couldn't sell it for cow feed and he said they did not" (R. 293-294).

In reply to the question whether or not any warning had been received from Du Pont after the delivery of the letter of July 31st, he, Ford, said, "I didn't receive a warning from the Du Pont Company but I received a warning from the State Plant Board on January 10, 1952." When asked in particular whether he had received warnings in October and November, 1951, from Du Pont as to whether or not the trichloroethylene processed meal was toxic he answered, "I did not" (R. 294).

In weighing the testimony of R. Stuart Armstrong, consideration must be given to the absence at the trial of L. L. Ford, a fact known to Armstrong. During the trial of the case, *Frank L. Ladner* v. *du Pont*, Circuit Court, Pearl River County, Mississippi, Reversed, *du Pont* v. *Ladner* (1954) 221 Miss. 378, 73 So. 2d 240. L. L. Ford was present and testified on behalf of the plaintiff. R. Stuart Armstrong was also a witness at the trial, testifying for the defendant du Pont.

Several months prior to November, 1955, and at all times since, L. L. Ford has been out of the United States. To avoid delay and permit trial at the November Term 1955 of the instant cases, it was stipulated that the testimony of L. L. Ford given at the trial of the *Ladner* case would be accepted as Ford's deposition and as such admitted in evidence (R. 253, 254). The *Ladner* case involved the recovery of damages for the loss of dairy cows fed soybean meal manufactured by Magnolia through the trichloroethylene process.

Du Pont had a copy of the transcript of all of the testimony in that case and Armstrong had the oppor-

tunity of reviewing the testimony of L. L. Ford and his own testimony at that trial prior to appearing as a witness on behalf of the defendant in the cases below (R. 431-432).

Having quoted at some length the testimony of L. L. Ford concerning the conversation he had with R. Stuart Armstrong at Greenville on August 3, 1951, the occasion of the delivery of the letter of C. B. Shepherd of July 31, 1951, Exhibit 35, it is appropriate to quote the direct testimony of Armstrong on this point and in part his cross-examination:

Direct examination: (R. 404-408).

Q. Now when you delivered that letter to Mr. Reed and Mr. Ford, what was said by any and all of you at that time?

A. Well, at the time I delivered this letter, their plant was shut down, they were not using the solvent plant. They had no suitable beans. They had heard of these outbreaks in the North, and they were very much concerned over this letter, because as they stated to me, they were in bad financial shape, and they had planned to sell their plant, but with this letter, plus the recommendation in this letter, plus the information coming down from the North on those disease outbreaks, they didn't think their chances of selling the plant would be very good. They felt it would be difficult to sell it.

They also advised that in line with Mr. Shepherd's suggestions, that should they resume operations, they would investigate the possibility of selling this meal to swine and poultry raisers, to be used as feed for those animals, as outlined in the letter.

Q. Now tell us whether or not there was any instruction given you by Mr. Shepherd, other than the ones you told us about a moment ago, were those all the instructions given you by Mr. Shepherd?

A. Yes, yes, sir.

Q. Now Mr. Armstrong, there has been testified in this case through Mr. Ford, by his deposition, that on the occasion of the delivery of this letter of July 31, 1951, that Mr. Ford said that he told you, "Here you have let us spend $500,000.00 building this mill, and now you tell us we can't use it to manufacture feed." Did Mr. Ford make such a statement to you?

A. No, no.

Q. Did he make any statement that might be reasonably interpreted to be the same or similar to that?

A. No, I don't recall it.

Q. And it has been further testified by Mr. Ford in that same deposition, that you then said "The reason I brought it to you personally, was because I didn't want you to get excited about it." Did you make such a statement?

A. No, I didn't.

Q. Did you make a statement that might be reasonably interpreted as being similar to it or equivalent to it?

A. No, I am sure I didn't. I wanted him to be concerned about that letter.

Q. Now, Mr. Armstrong, Mr. Ford, in that same deposition, further testified that, "90 per cent of our business is cattle feed, and we can't sell a car a year other than for cattle feed, and now you tell us not to sell any more for cattle feed", and that you replied, "I didn't say that."

Q. Did you make that statement attributed to you by Mr. Ford, that "I didn't say that?"

A. No, sir.

Q. Or anyone that is equivalent to it or similar to it?

A. No, sir, I am sure I didn't.

Q. Did Mr. Ford make any statement as stated that "90 per cent of our business is cattle feed, and we can't sell a car a year other than for cattle feed, and now you tell us we can't do that?"

A. No, I don't recall any such statement.

Q. Or any statement similar to that, or which might be reasonably construed to be the same as the one I have just read?

A. No. They weren't operating at that time. They didn't think they would be.

Q. And why were they not operating, what was the trouble there?

A. Well, they had run out of beans, and their credit was bad, and they couldn't buy more beans at that time.

Q. And Mr. Ford, in his same deposition, has further said or testified that he asked you: "Does the du Pont Company know we can't operate our mill, and have built one here that cost us $500,000.00, if we can't sell it for cattle feed, we can't operate it." Did he say that?

A. No, sir.

Q. Did he further say, "Does Du Pont tell us to shut it down, do they have any evidence", was that said by Mr. Ford on that occasion, Mr. Armstrong?

A. No.

Q. Or any other statement by Mr. Ford that might be construed to be the same or equivalent, and did Mr. Ford make any such statement?

A. No, he did not. They indicated that they were going to look into the possibility of selling it to the poultry and swine outlet.

Q. Now Mr. Ford further said in his deposition, "that you then told him, No, there isn't any evidence conclusive, there are rumors circulating from time to time." I'll ask you whether or not you made that statement or any wording similar to that statement?

A. I absolutely did not.

Q. Mr. Ford in the testimony of that deposition further has testified that he told you at that time that, "We couldn't operate unless we did sell it for cow feed", and that you, Mr. Armstrong, knew it was going to be used for that purpose, and that is with reference to the 23rd of November, 1951, sale. [Sale of trichloroethylene by du Pont to Magnolia November 23rd, 1951—approximately four months after the letter of July 31, 1951, Exhibit 35].

Did Mr. Ford make that statement, or did you make that answer?

A. No, sir, not at all.

Q. Did you know or have any idea it was going to be used for cow feed?

A. I did not. I had no idea whatsoever that it was.

Q. And did Mr. Ford make the statement that you knew it was going to be sold for cattle feed?

A. No, not to me.

Q. And that he told you, "He couldn't sell it", or I will read his exact words, "I told Mr. Armstrong that we could not operate unless we did sell it for cow feed"; Mr. Armstrong did Mr. Ford make that statement to you?

A. No.

Q. Or words that might be either said to be the same as that statement?

A. No, sir, I'm sure he didn't.

Q. Now, on the occasion,—on this same occasion when the letter was delivered, Mr. Ford testified that

you, Mr. Armstrong, expressed the opinion that so far as you knew there was not any evidence that trichloroethylene extracted meal had any thing to do with the cattle losses, and I'll ask you did you make that statement?

A. No, we didn't,—I didn't. We did not detract from that letter of Mr. Shepherd.

Q. Now Mr. Armstrong, did Mr. Ford ask you this question: "I asked him point blank if Du Pont would recommend our closing the plant down because we couldn't sell it for cow feed", and it is said by him that you said, "They did not". Did Mr. Ford make that statement, and did you make that answer, Mr. Armstrong?

A. No, sir.

Q. Or words similar to that or equivalent to it?

A. No.

Further, concerning the mentioned conversation of August 3, 1951, the witness testified on cross-examination as follows:

Q. What did you say about the Minnesota experiment? (R. 427).

A. I told them that the——

Q. Now, I am asking you what you said about it?

A. I told them that "experiments are in progress."

Q. That is all you said?

A. And I said "We hope they will shed some light on the situation."

Q. You just told them that experiments were in progress?

A. Yes, sir, and that nothing definite had yet been determined.

Q. Nothing specific had been determined?

A. No.

Q. He [L. L. Ford] was present at the trial of the case of Ladner v. du Pont at Poplarville, Mississippi, was he not? (R. 431 et seq.)

A. He was a witness there, yes, sir.

Q. And he testified as a witness in that case, didn't he?

A. Yes, sir.

Q. Mr. Ford is not in Greenville today, is he, Mr. Armstrong?

A. I don't know about that. I haven't seen him.

Q. Don't you know that Mr. Ford left several weeks ago for Iran?

A. By hearsay. I heard that. I couldn't know it.

Q. Now you also know that the testimony of Mr. Ford by deposition was admitted in evidence in this case, that is, the testimony of Mr. Ford in the Ladner v. Du Pont case, was admitted in evidence under stipulation of counsel in this case, do you know that, Mr. Armstrong?

A. Yes, sir.

Q. Why did you not in the Ladner v. Du Pont case, deny the statements made by Mr. Ford when he testified as a witness in that case?

A. I didn't know what Mr. Ford testified to in that case until I read the transcript of the trial.

Q. Well, you didn't deny any statements he made, did you?

A. I didn't know what he stated in that case.

Q. Did you deny any statement that he made?

A. I didn't know what statements he made, so I couldn't deny them.

Q. Do you know whether you denied them or not, you know that, don't you?

A. I denied them here today.

Q. Did you deny them there at that time?

A. At that time, I didn't know what he said. I was out waiting in an outside room, like I have been here today. I don't know what Mr. Ford stated.

Q. You just read your testimony, have you not?

A. Yeah, I've read my testimony here about this conversation.

Q. Well, you just read it when I gave it to you a few moments ago, isn't that right?

A. Yes.

Q. And that testimony doesn't contain any denial on your part of any statement made by Mr. Ford, relative to that conversation at the time of the delivery of the letter of July 31, on August 3, 1951, does it?

A. You are asking me that now?

Q. I'm asking you that now.

A. As of my knowledge today, I am sure I denied them.

Q. Well, according to that transcript, you didn't deny a statement made by Mr. Ford in the Ladner v. Du Pont case, of the conversations that were held with you on August 3, 1951?

A. If you will give me that transcript again, I'll look at it. I can't read it all at once.

Q. Very well, here it is.

A. Can you show me what Mr. Ford's testimony was to compare against this that you are asking me, if I denied anything that he said; is that what you are asking?

Q. The question is very simple, Mr. Armstrong.

A. Not to me.

Q. I asked you if that testimony contained any denial by you of any statement made by Mr. Ford concerning that converstation at the time of the delivery of this letter on August 3?

A. This testimony that I have here?

Q. Yes, that testimony that you have there. Do you see anywhere in it where you denied anything Mr. Ford has said?

A. No, I don't

Q. Then there is no denial there?

A. No, not at that time.

The death of cattle in Minnesota in 1951 and the research at the University of Minnesota during that year, play an important part in whether du Pont gave that degree or type of warning required by law, whether it withheld information that should have been disclosed.

The witness (R. Stuart Armstrong) testified that he first went to the University of Minnesota the latter part of May or early in June, that he knew of no communications with the University prior to his visit, and that he first learned of the research by the University at the time conferences were held with other concerns for formulating a program for research and that the conference was held about the time of his mentioned visit, that outbreaks occurring in Minnesota in January, 1951 were the reason for the mentioned conferences, and that he knew generally some 41 calves and cows fed trichloroethylene processed soybean meal had died (R. 422).

With respect to whether reports had been received from the University of Minnesota concerning the research being carried on although the witness was indefinite, he did testify, "I am sure they must have but I couldn't give you, say, as of a certain date, that we did receive one, but I'm sure we must have. They must have because we were helping support the research" (R. 424). And in reply to the question, "Did you ever see any reports?" he said, "Yes, I did.", (R. 424) and he admitted reading the articles by Drs. Twichaus

and Lessure on their experiments conducted at the University of Minnesota in the spring of 1951. The article discloses that one of two calves, used in the experiment, fed trichloroethylene soybean meal, died July 9, 1951. The article was published in October, 1951, and read by the witness in November, 1951 (R. 426). The record shows with respect to this witness that he wrote no letters nor forwarded copies of any reports concerning the Minnesota experiment and the outbreak in that state to Magnolia or anyone connected with it at any time either prior to the date of delivery of the letter of C. B. Shepherd, of July 31, 1951, or during the remainder of that year (R. 436, 437).

On this point to be specific R. Stuart Armstrong was asked, "Did you or the defendant send copies of any reports received at any time from the University of Minnesota on the work done there to Magnolia Soy Products Company or any of its officers * * *?," (R. 436) and he answered as stated in the paragraph immediately above.

The occurrences in Minnesota were known to Armstrong on August 3, 1951 yet he made no mention of them on that date to Ford or Reed.

There is no evidence that du Pont, by label, labeling or through any media, public or otherwise, warned the petitioners or the general public of the dangerously harmful effect of feeding the trichloroethylene extracted meal to cattle, a duty it was required to carry out under the Federal Food, Drug, and Cosmetic Act.

Referring again to the conversation that took place at Greenville, Mississippi, on August 3, 1951, the rec-

ords further show the only specific statement made by Armstrong is that the Minnesota experiment was in progress, it was hoped that the experiment would shed some light on the results of feeding trichloroethylene-processed meal on the health of cattle and as of the time he was speaking nothing definite had been determined. This witness also said that he did not know if labels were on the drums of trichloroethylene shipped to Magnolia (R. 438) and with regard to recommending or suggesting to Magnolia that it place labels on the bags in which it shipped meal, no instructions, not even a suggestion had been made at any time before or after delivery of the letter of July 31, 1951, Exhibit 35, that Magnolia label its product, the label stating in effect that the meal was not to be used for feed for cattle (R. 438, 439).

Dr. Robert A. Woodberry, du Pont's expert witness when questioned on direct examination on the uses of trichloroethylene replied: "Yes, I know it is used industrially, in industrial fields, but because of its toxic effects, as is true of all drugs, why I know that it is not used for cow feed or other animals of like nature, because their use of it would be dangerous." Typewritten copy of transcript on file with the Court of Appeals.

Mr. C. B. Shepherd, witness below for du Pont, is the manager of that Company's Chlorine Products Division (R. 443). T. J. Milligan (R. 462) and his successor, R. Stuart Armstrong, were for all times herein pertinent, under his supervision. Each reported to him. Du Pont gave what it termed, "Technical Sales Service" to its customers (R. 445). Relative to the service rendered Shepherd testified: "We spend full time work with them on design of equipment and teaching them as to the use of the solvent, and stay until we feel

that they would be sufficiently informed to where they could carry on the operation and until they would be competitive. Now also on the equipment companies, that manufacture equipment which will be put to use handling our solvent, using it for extracting various products, we stay with those people and give them every direct help that we can toward the use of the technical company's equipment, and we give those technical companies who manufacture the equipment everything that we know about it and when we leave, why the companies require no further service." (R. 446).

The witness continued in reply to further questions:

"Why, we get requests of that kind all the time, many times, and we have probably spent thousands of dollars of information, engineering, chemical information, and information on physical properties of our solvent, that no individual company interested in the use could possibly obtain for themselves, so naturally they call on us for that information." (R. 447). And he admits that Magnolia received technical assistance in the design of their solvent recovery equipment, and in the initial operation of that equipment (R. 447).

It is obvious that if the individual company could not obtain for itself chemical information and information on the physical properties of trichloroethylene that dairymen and wholesale feed dealers could not.

This witness, then employed by du Pont, first knew of the hemorrhagic disease in 1939, although du Pont had been manufacturing trichloroethylene since 1930, knew of reports from Stockman and some German authorities on hemorrhagic disease in Scotland, in Germany and in the Low Countries (R. 448). (Ante, p.

14) He further testified du Pont initiated tests at Cornell University to determine whether trichloroethylene was connected with the hemorrhagic disease in cattle, the experiment extended from 1937 to 1939 (R. 449). The results were written by Dr. Vollertsen, an employee of du Pont. His paper is known and referred to in the testimony and in this brief as the Vollertsen or Cornell Report. These reports are briefly described in the testimony of Ford as to T. J. Milligan's activities and letters, ante pages 10-14. In 1950 du Pont received reports from Iowa and Colorado of deaths of some 150 cows, 20 of which had been fed trichloroethylene (R. 450). These outbreaks are mentioned under the testimony of L. L. Ford in connection with conversations had with T. J. Milligan and letters received by Ford from him. These outbreaks are what were referred to by Milligan as "mere rumors." Du Pont claims after the outbreak in 1950 in Colorado and Iowa it had no further complaints on the use of trichloroethylene processed meal until the outbreak of 1951 in Minnesota. The action taken is set out under the testimony of R. Stuart Armstrong.

After the experiment at Cornell University, commenced in 1937 and completed in 1939, du Pont conducted no further experiments on the feeding of the tri-processed soybean meal to cattle (R. 467). It did, as has been stated, contribute in June or July, 1951, to the experiment at the University of Minnesota, but the results of the experiment were not made known to Magnolia.

Iowa State College University experimented in the field for some fifteen years. The witness indicated the work there was mainly with equipment. He admitted Iowa had conducted some experiments but in his opin-

ion they were not what he termed "a controlled experiment" (R. 468).

With regard to the outbreak in Minnesota the witness further admitted he first heard of it in March or early April, 1951, (R. 469) that he knew of the deaths in Minnesota by April 26, 1951 of 41 cows and calves that had been fed tri-processed meal, although he did not recall the exact number (R. 469). He knew that out of 30 cattle in the Glencoe, Minnesota area some 22 died by the end of June, 1951 (R. 469). This witness said in reply to the question, whether du Pont had received reports from the University of Minnesota, "We were in constant touch either by letter or personal visits with the University of Minnesota", (R. 470) and stated that no copy of a report received was ever sent to Magnolia or any of its officers and further, that no copy of a report on the Iowa and Colorado outbreaks had ever been sent to them (R. 470, 471). The record shows du Pont received a report from the University of Minnesota on an experiment in which the cattle under experiment were divided into five groups, that all the cattle in group 3 died (R. 477). These were trichloroethylene-processed fed cattle. No copy of the report was sent to Magnolia. This highly important informatoin was not conveyed to Magnolia. Not to do so is a dereliction of duty, a violation of the duty imposed as will hereinafter be shown not only by statute but also under the common law.

Whether products are properly labeled as required by law, as heretofore stated, is of great importance in this case.

Mr. Shepherd, although head of the Chlorine Products Division, did not know if drums containing the product tri manufactured under his division, and shipped through interstate commerce were labeled. This statement he had made with regard to drums shipped to Magnolia prior to the date of delivery of his letter of July 31, 1951, as well as thereafter (R. 472, 473).

The court's attention is directed to the admission of this witness, C. B. Shepherd, that of the eight companies manufacturing tri for processing soybean meal for cattle during 1951, only one was doing so at the end of that year (R. 462). This is conclusive proof of the highly inherently dangerous properties of the trichloroethylene when used as the extracting solvent in manufacturing soybean meal.

The only testimony of du Pont's witness, Frank L. McDonald, relevant to the issue or material to this appeal is that trichloroethylene was received by Magnolia from du Pont in drums with no label other than "that it was trichloroethylene" and "That's the only thing I ever saw in the way of label on those drums" (R. 390).

Petitioners called Dr. Raymond T. Vaughn, Professor of Chemistry and Head of the Chemical Department at Southeastern College, Memphis, Tennessee, and Director of Research and Consulting Service with the Barrow Agee Laboratories in Memphis, as their expert witness (R. 337).

Dr. Vaughn expressed the opinion that while trichloroethylene in quantities of one to three ounces

daily is not toxic to cattle and raw soybeans are not. "that in the processing of soybean meal by the trichloroethylene extraction procedure that a toxic material, which is poisonous to cattle is produced" (R. 340). There is no evidence refuting or even qualifying the opinion. This witness also testified that the higher the temperature under which the meal was processed the greater was the quantity of reacting material produced in a given quantity of time (R. 341, 351).

He expressed the view that a chemist would know the properties of trichloroethylene and soybean and would know that those properties when combined under heat would produce a substance poisonous and toxic to cattle. This witness further said that trichloroethylene is listed as a drug in the United States Pharmacopeia (R. 344). On redirect-examination, Dr. Vaughn stated in reply to the question, "Now Doctor, your testimony in this case, your opinions have been based on your knowledge, and in what field, the toxicology field or the chemistry, or what field." The answer is "They have been based on my knowledge of trichloroethylene and the materials that occur in soybean meal. I don't think this would be very difficult at all for a chemist to see that you produce toxic material from those two" (R. 356).

From the last statement the conclusion to be drawn is clear that any qualified chemist would know that soybeans and trichloroethylene when heated together produce a poison yet du Pont's chemist apparently did not know this simple fact which it should have known and under the law is charged with knowing.

Throughout the trial du Pont attempted to prove negligence on the part of Magnolia in that Magnolia allegedly failed to maintain the meal at proper temperature during the extraction process, that is a heat of 240° F. Dr. Vaughn's uncontradicted testimony established the immateriality of such a theory. With so little knowledge of the properties of soybeans and of its own products trichloroethylene, du Pont advertised and sold trichloroethylene as a safe extraction solvent and did so without a label, without directions and without warning of the harmful potentialities of such meal to cattle. Should it be admitted for purpose of argument that Magnolia was negligent in manufacturing this would not relieve, as is hereinafter shown, du Pont from liability.

After Dr. Vaughn testified the plaintiffs rested and du Pont moved for a verdict. In denying the motion the court dictated for the record a statement of which the following is a part: "there is a question in this case which I think would be a question for the jury, as to whether or not du Pont sufficiently gave warning to the Magnolia Soy Products Company, that this theory had been found full of errors, and that there was danger in this feeding. That, I think, is for the jury, and if it may become a question for the jury, I do not think it would be at this stage, but it may become a question for the jury as to whether the chemical trichloroethylene was the toxic cause of the deaths of these cattle, but in this view du Pont, having knowingly furnished this chemical for this use, knowing that it would go into the processes of making soybean meal,

and their theory about the matter, however sincere and honest they may have been in it, proving to have been false, that is a jury issue, and the motion for a directed verdict would be overruled" (R. 358).

While some of the following facts do not appear in the record, it is vital to an understanding of the situation in which the trial judge placed counsel to call them to the attention of this Court.

On November 29, 1955, the last day of trial, shortly after court convened that forenoon, counsel for the plaintiffs, petitioners here, and for the defendant were called by the Judge into chambers. Petitioners brought out that they had for presentation to and consideration by the court a number of written instructions. The court asked if there were an instruction on intervening cause. Petitioners' Instruction No. 10 [R. 214] was presented and after reading it the court called for authority on the use of the words "highly extraordinary". Authorities were submitted sustaining the use of the word "highly" yet the court deleted the word and on doing so immediately proceeded to the bench. No opportunity was given by the court to present the remaining instructions. In fact, with the exception of Instruction No. 10, the court did not at that time read them. That part of Instruction No. 10 adopted by the court is set out in the Appendix hereto at page 23a.

Immediately upon taking the bench the court commenced charging the jury. Roger E. Brooks and C. Nils Tavares, of counsel, were not present in court at the beginning of the charge. William G. Burgin, Jr., of counsel, came to the judge's chambers and made the

statement, "The judge is charging the jury.", and counsel in chambers immediately entered the court room.

On conclusion of the charge, the court asked if there were objections. At that time there had been no ruling on the requested written instructions and the only statement then made was an exception by C. Nils Tavares of counsel for appellants, in these words, "For the record, Your Honor, may we most respectfully raise the question of law by excepting to the court's ruling, ruling out possible prospective profits?" The court responded, "Yes, sir, you may do that."

After the jury retired the court made this statement, "Mr. Reporter, take this into the record. There were presented to the court in this case a number of instructions requesting for the plaintiffs and for the defendant which the court will hand to you and which shall be marked as 'Proposed Instructions' in this case.

"The court has considered these instructions and while quite a number of them are correct theoretical statements of law, the court did not give these instructions because of the fact that under the very limited factual situation which the court found existed in this case, the court was of the opinion and still is of the opinion that the jury would get a more intelligent idea of the issue on which they had to pass than it would have if the court had read certain of the requests to charge couched in more or less legalistic language" (R. 499).

It is pointed out that the court, as stated, gave no opportunity to be heard on instructions prior to the charge, that the court instructed the jury prior to ar-

gument by counsel, and that it was not until after the jury had retired that the court made the above-quoted statement.

REASONS FOR GRANTING THE WRIT

I. Although the Circuit Court said:

> "There was ample evidence to sustain the verdict for du Pont on the issue of intervening cause. We need not determine whether, had the verdict and judgment been for the appellants, we would be required to reverse under the rationale of the Ladner case.", (R. 569).

it nevertheless appears, from the extensive quotation from and discussion of the Ladner decision, that the Circuit Court obviously considered itself bound by that State court decision in the construction of the Act in relation to the facts of this case, since it held that the Act had no materiality even though the trial court had failed and refused to instruct the jury as to the existence and extent of the duty and liability of a manufacturer under the Act to the general public and ultimate consumer.

> "Congress has never essayed to declare the substantive state law, or to abolish or nullify, a right recognized by the substantive law of the state where the cause of action arose, *save where a right or duty is imposed in a field committed to Congress by the Constitution.*" (Emphasis supplied) *Sibbach* v. *Wilson & Co., Inc.*, 1941, 312 U. S. 1, 9, 10.

Here, we are dealing with "the extent and nature of the legal consequence of the condemnation" of certain unlawful acts under a federal Act in a field—interstate commerce—committed to Congress by the Constitu-

tion; hence, a State court decision has no binding effect whatsoever on the matter at issue.

II. The Federal Food, Drug, and Cosmetic Act sets up a universal and uniform standard and policy of adequacy of warning and information required to be given to the general public and ultimate consumer, through labeling and otherwise by a manufacturer of a dangerous article sold in interstate commerce. Here we are dealing with an article sold for use in manufacturing cattle feed, conclusively proved to make the feed deadly poisonous to cattle. When such a duty is breached, the legal consequences are to be determined, not by the law of the state where the cause is tried, but by that federal Act and applicable federal decisions. The manufacturer's duty extends to all foreseeable users, which would certainly include petitioners Waldron (the ultimate wholesaler and retailer) and his customers (the ultimate consumers). Whether that duty to warn ultimate consumers is fulfilled in a given set of circumstances is a factual question to be determined according to federal law (statute and decisions), not state law, by the jury in a jury case. To say that the Act is immaterial, in such circumstances, so as to allow the jury to determine the question without instruction as to the scope and extent of that duty to the ultimate consumer and public, is clearly erroneous.

III. The jury were told by the trial judge, in effect, that the petitioners were entitled to recover, unless the chain of causation was broken by an intervening cause. However, to a juror, as even to an attorney not peculiarly cognizant of the terms and effect of the Federal Food, Drug, and Cosmetic Act, including the absolute liability imposed thereby on a manufacturer or distributor in interstate commerce of an unlabeled dan

gerous article, such an instruction could not possibly carry the full import of the Act, nor the full picture of all the circumstances to be considered, in determining the sufficiency of the alleged warning given in this case by the respondent. For all that appears, the jury could well have believed that actual negligence or wilful conduct by the manufacturer was a necessary ingredient of the liability, for the Act would be meaningless to them, unless they were told (as they were not) that a violation of the Act constituted negligence *per se* as against all foreseeable users. In order to be able to adequately judge such sufficiency the jury had to have all of these circumstances in mind, and the trial court's instructions left a gaping void in this respect. For the Circuit Court of Appeals to hold, under such circumstances, that a federal act is immaterial when that act imposes a duty on manufacturers of food, drugs and cosmetics sold or distributed through interstate commerce to label and to warn the general public by labeling of the dangerous potentialities of the product if used for the purposes for which manufactured, when the evidence shows that there was no label or labeling, is serious error.

IV. The opinion generally of the Fifth Circuit Court appears, up to a certain point, to indicate that that Court felt that petitioners should not be prejudiced by the state of the record in the trial court, which indicated that technically the exceptions of petitioners to the court's failure to give any of the 20 written instructions requested (R. 203-222) (Appendix pp. 14a-27a) by petitioners, except a portion of one of them, were made after the jury had retired. Accordingly, the opinion seems to proceed to a determination on the merits of the issues raised by the lower court's failure to give the requested instructions. However, near the close of the opinion, the appellate court comments that

"The only objection of the appellants to the instructions given by the court, made before the jury retired to consider its verdict, was directed to the question of prospective damages" (R. 570). Lest we appear to have overlooked this possible ground for the appellate court's decision, we point out that the facts are as follows: As shown *ante*, pp. 36-8, when petitioners' counsel presented their requests for instruction in chambers, of which the court made no record, without reading such requests or allowing petitioners' counsel to argue the same, the court proceeded to the bench and, without warning or waiting for counsel to reenter the courtroom proceeded orally to charge the jury *before* the argument, and, after the argument and until after the jury retired, failed to make any ruling on the petitioners' requests; that the court for the first time made its ruling denying the requested instructions after the jury had retired, and that, at the earliest possible opportunity thereafter the petitioners duly excepted to such ruling. Surely, under rules 46 and 51, construed together, the exceptions were taken in time, and, if the Fifth Circuit Court's opinion does in fact base the ultimate result reached by it, which is not clear, upon the mere technicality of what appears on the record as to the time of the exceptions, then it is in error.

V. This case also presents a question of first impression, whether the Federal Food, Drug, and Cosmetic Act creates a new and independent federal civil cause of action based on failure by a manufacturer or distributor of articles sold or distributed in interstate commerce to adequately perform the duty of placing labels on his product or labeling so as to warn adequately all foreseeable users of the potential dangers of using the product for the purposes for which it is manufactured or distributed.

ARGUMENT

Question I. The complaints being expressly bottomed on a claim of a federal question involving a federal cause of action under a federal statute—the Federal Food, Drug, and Cosmetic Act—local statutes and decisions are not controlling.

In each of the complaints in the trial court the petitioners (plaintiffs therein) alleged in practically identical language:

> "4. The jurisdiction of the Court is invoked under Section 1332, Title 28, U. S. Code, June 25, 1948, c. 646, 62 Stat. 930 [diversity of citizenship]; and under the Federal Food, Drug, and Cosmetic Act, Chapter 9, Title 21, U. S. Code, June 25, 1938, c. 675, 52 Stat. 1040 [federal question]."

(R. 26, Nishida complaint; R. 135 Sokei complaint; R. 170-171, Waldron complaint). Likewise, throughout each complaint, manufacture and sale in interstate commerce by respondent in violation of the Federal Food, Drug, and Cosmetic Act, is alleged. (See, for example, in the Nishida complaint, the other complaints containing substantially identical allegations, paragraph 14, Count 1, R. 29-30; paragraphs 8 and 11, Count 4, R. 39, 40). It thus appears that the complaints are expressly bottomed on both diversity of citizenship and the existence of a federal question.

The Circuit Court of Appeals, stated:

> "There was ample evidence to sustain the verdict for du Pont on the issue of intervening cause. We need not determine whether, had the verdict and judgment been for the appellants, we would be required to reverse under the rationale of the Ladner case." (R. 569).

Nevertheless, a reading of the entire decision indicates that the Circuit Court considered itself bound by the rulings in that State decision.

After stating that, in the *Ladner* case,

> "Upon a trial the testimony of Ford as to the discussion with Armstrong was the same as in the case here decided, in fact in this case a transcript of Ford's testimony in the Ladner case was, by agreement, used in lieu of a deposition or other testimony by Ford," (R. 566),

the Circuit Court said, among other things,

> "The Missssippi court held as a matter of law, as was found by the jury in the case before us as a matter of fact, that the sales by Magnolia of the tri-processed meal for cattle feed after being warned was an intervening act which broke the chain of causal relationship between du Pont's negligence and the injury to the cattle." (R. 567).

Then, continuing, the court quoted copiously from the *Ladner* case (R. 567-568).

It is to be noted that the *Ladner* decision, among other things, stated:

> "In view of the conclusions that we have reached on the question of proximate cause, it is not necessary for us to consider the question as to whether the Federal Food, Drug and Cosmetic Act was applicable to the sale of trichloroethylene by du Pont to Magnolia." (R. 79).

The Circuit Court of Appeals likewise held:

> ". . . Some of the instructions requested ,such as those involving violations of the Federal Food, Drug and Cosmetic Act and the Hawaii Food, Drug and Cosmetic Act, had no materiality in view

of the instruction that the verdict should be for the appellants unless the chain of causation was broken." (R. 570).

If, as we believe, the Circuit Court felt itself bound by the *Ladner* decision, then it was in error.

"When a federal statute condemns an act as unlawful the extent and nature of the legal consequence of the condemnation . . . are . . . federal questions, the answer to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield,". *Picking* v. *Pennsylvania R. Co.*, 3d Cir. (1945) 151 F. 2d 240, 251 quoting *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176.

"Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States; but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution." *Sibbach* v. *Wilson & Co., Inc.* (1941) 312 U. S. 1, 9, 10.

". . . For here a different question is presented—whether the doctrine of estoppel as invoked below is so in conflict with the Sherman Act's prohibition of price fixing that this court may resolve the question even though its conclusion be contrary to that of a state court.

* * * * *

"It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common

law rules. In such a case our decision is not controlled by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296; *Prudence Corporation* v. *Geist*, 316 U. S. 89, 95; *Board of Comm'rs.* v. *United States*, 308 U. S. 343, 349-50; cf. *O'Brien* v. *Western Union Telegraph Co.*, 113 F. 2d 539, 541. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. [citing cases]" *Sola Electric Co.* v. *Jefferson Co.*, (1942) 317 U. S. 173, 175, 176.

See, also, *Philco Corp.* v. *Phillips Mfg. Co.*, (CCA 7, 1943), 133 F. 2d 663; *Stephenson* v. *Grand Trunk Western R. Co.*, (CCA 7, 1940), 110 F. 2d 401, cert. den. 311 U. S. 720.

The very definite federal policy established by the Federal Food, Drug, and Cosmetic Act is to give adequate protection to the buying public and it has been so interpreted by the federal courts. See, for example, *United States* v. *Dotterweich* (1943), 320 U. S. 277, discussed post. As pointed out post, under Point V, the Act creates a new and independent federal cause of action, based upon this federal policy and on the prin-

ciple that, where there is a wrong there must be a remedy. This federal policy is not to be thwarted by conflicting or narrower state laws or decisions.

This principle is clearly sustained in 54 Am. Jur., UNITED STATES COURTS, 974, 975, sec. 352, wherein it is stated:

> "WHERE QUESTION IS DEPENDENT ON FEDERAL CONSTITUTION, TREATY OR STATUTE.—It is a familiar doctrine that the prohibition of a Federal statute may not be set at naught or its benefits denied by state statutes or state common-law rules. So, the rule of Erie R. Co. v. Tompkins leaves untouched questions dependent upon the Constitution, treaties, or statutes of the United States; the duty of Federal courts to follow state laws and decisions, under the rule laid down in that case, does not extend to matters governed by the Federal Constitution, by treaties of the United States, or by act of Congress. . . .
>
> "The doctrine of the Tompkins Case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of Federal statutes that legal relations which they affect must be deemed governed by Federal law having its source in those statutes, rather than by local law. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, although left by the statute to judicial determination, are nevertheless Federal questions the answers to which are to be derived from the statute and the Federal policy which it has adopted. To the Federal statute and policy, conflicting state law and policy must yield. The duty of Federal courts to follow state laws and decisions, under the rule laid down in Erie R. Co. v. Tompkins, does not include matters affecting the extent of the Federal courts' jurisdiction."

To the same effect is *D'Oench, Duhme & Co., Inc.* v. *Federal Deposit Ins. Corp.* (1942) 315 U. S. 447, 456, where suit was filed in Missouri on a note payable to a bank in Illinois; the court held in that case that the district court and the circuit court of appeals were in error in applying the law of Illinois, saying:

> "For we are of the view that the liability of petitioner on the note involves decision of a federal not a state, question under the rule of *Deitrick* v. *Greany*, 309 U. S. 190."

If, therefore, our contentions that the present actions involved federal causes of action raising federal questions and determined by the policy of a federal act, and that the circuit court of appeals considered itself bound by the Mississippi *Ladner* decision, are correct, then obviously the circuit court was in error, because *Erie Railroad* v. *Tompkins*, 304 U. S. 64 and *Klaxon Co.* v. *Stentor Electric Mfg. Co.* (1941), 313 U. S. 487, are inapplicable.

Other cases sustaining this principle are:

Am. Surety Co. v. *Beth. Nat. Bank* (1941), 314 U. S. 314;
Bd. of Trade v. *Johnson* (1924), 264 U. S. 1;
Kreitlein v. *Ferger* (1915), 238 U. S. 21;
Mo., K. & T. R. Co. v. *Harriman* (1913), 227 U. S. 657;
Fleenor v. *Hammond* (CCA 6, 1941), 116 F. 2d 982;
Luken v. *Lake Shore & M. S. Ry. Co.* (1911), 248 Ill. 377, 94 N. E. 175;
Com. v. *Peoples Express Co.* (1909), 201 Mass. 564, 88 N. E. 420;
Cook v. *Northern Pac. Ry. Co.* (1915), 32 N. D. 340, 155 N. W. 867;
Western Un. Teleg. Co. v. *Bowles* (1919), 124 Va. 730, 98 S. E. 645;

Wogahn v. *Stevens* (1940), 236 Wis. 122, 294 N. W. 503;
Clearfield Trust Co. v. *U. S.* (1943), 318 U. S. 363.

Question II. An undisputed violation of the Federal Food, Drug, and Cosmetic Act makes the Act material to the issues of actions brought thereunder.

The provisions of the Federal Food, Drug, and Cosmetic Act (21 U. S. C. A. 301-392) directly pertinent to these causes of action are:

"Sec. 321. Definitions; generally
For the purposes of this chapter—

(a) The term 'Territory' means any Territory or possession of the United States, . . .

(b) The term 'interstate commerce' means (1) commerce between any State or Territory and any place outside thereof, . . .

. . .

(f) The term 'food' means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

(g) The term 'drug' means (1) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; . . .

. . .

(j) The term 'official compendium' means the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, official National Formulary, or any supplement to any of them.

(k) The term 'label' means a display of written, printed, or graphic matter upon the immediate

container of any article; and a requirement made by or under the authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

. . .

(m) The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

(n) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual."

"Sec. 331. Prohibited acts

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise."

"Sec. 352. Misbranded drugs and devices

A drug or device shall be deemed to be misbranded—

False or Misleading Label

(a) If its labeling is false or misleading in any particular.

. . .

Prominence of Information on Label

(c) If any word, statement, or other information required by or under authority of this chapter to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

. . .

Directions for Use and Warnings on Label

(f) Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users; . . ."

The pertinency of the above-quoted provisions to the petitioners' actions lies in the fact that there is no evidence that du Pont, by label, labeling, or through any media, public or otherwise, warned the petitioners or the general public of the dangerously harmful effect of

feeding the trichloroethylene-extracted meal to cattle, a duty it was required to carry out under the Act.

Respondent's witness, Mr. Shepherd, although head of its Chlorine Products Division, did not know if drums containing the product tri manufactured under his supervision and shipped through interstate commerce were labeled. This statement he made with regard to drums shipped to Magnolia prior to the date of delivery of his letter of July 31, 1951 (Ex. 35, R. 290), as well as thereafter (R. 472, 473).

Respondent's witness Armstrong also said that he did not know if labels were on the drums of tri shipped to Magnolia (R. 438) and with regard to recommending or suggesting to Magnolia that it place labels on the bags in which it shipped meal, no instructions, not even a suggestion had been made at any time before or after the delivery of the letter of July 31, 1951 (Ex. 35), that Magnolia label its product, the label to state in effect that the meal was not to be used for feed for cattle (R. 438, 439).

Another du Pont witness, McDonald, testified that tri was received by Magnolia from du Pont in drums with no label other than "that it was trichloroethylene" and "That's the only thing I ever saw in the way of label on those drums" (R. 390).

The Federal Food, Drug, and Cosmetic Act sets up a universal and uniform standard and policy of adequacy of warning and information required to be given to the general public and ultimate consumer, through labeling and otherwise, by a manufacturer of a dangerous article sold in interstate commerce. Here we are dealing with a chemical solvent, listed in the official United States Pharmacopoeia as a drug (R. 344), sold

for use in manufacturing cattle feed, conclusively proved to make the feed deadly poisonous to cattle. When such a duty is breached, the legal consequences are to be determined, not by the law of the state where the cause is tried, but by the federal Act and applicable federal decisions. The manufacturer's duty extends to all foreseeable users, which would certainly include petitioner Waldron, the ultimate wholesaler and retailer, and his customers, the ultimate consumers, the remaining petitioners. Whether that duty to warn ultimate consumers is fulfilled in a given set of circumstances is a factual question to be determined according to federal law (statutes and decisions), not state law, by the jury in a jury case. To say that the Act is immaterial, in such circumstances, so as to allow the jury to determine the question without instructions as to the scope and extent of that duty (as defined by the federal statute) to the ultimate consumer and public, is to nullify the Act and disregard its purpose of protecting the general public.

See cases cited, *infra*, pp. 52-55.

> ". . . The statute relates only to the standard of care by which negligence may be determined. Whereas, prior to the act, negligence could only be shown by allegation and proof of facts showing a breach of duty; under the statute it is only necessary to establish the violation of the statute . . ." 22 Am. Jur. Food, 882, sec. 98.

Though a pure food statute does not expressly confer a right of action, a member of the public for whose benefit it was enacted may invoke its provisions for the purpose of showing negligence as a matter of law if injured by a violation of a duty so imposed. *Donaldson v. Great Atl. & Pac. Tea Co., et al.* (1938), 186 Ga.

870, 199 S. E. 213; *Gantt* v. *Columbia Coca-Cola Bottling Co.* (1939), 193 S. C. 51, 7 S. E. 2d 641. Note in 128 ALR 464.

The act was designed by the Congress to give adequate protection to the buying public, and with that view it has been so interpreted by our courts. The Supreme Court of the United States in *United States* v. *Dotterweich* (1943), 320 U. S. 277, 280, 284, 285 confirmed that view, saying:

> ". . . The purpose of this legislation [Federal Food, Drug, and Cosmetic Act] thus touch phases of the lives and health of people which, in the circumstances of modern industrialism are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. . . . In the interest of the larger good it [such legislation] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."
>
> . . .
>
> ". . . Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing an illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."

There is no evidence even tending to show negligence on the part of petitioners or of their having received any warning. The hazard, therefore, should not have

been placed on the innocent and it is believed that it would not have been so placed if the essential instructions had been included in the charge.

Where there is a duty to warn and the defendant fails to give the required warning, there is no assumption of risk. *Clinchfield Coal Corp.* v. *Ray* (1917), 121 Va. 318, 93 S. E. 601.

Additional authorities on the subject of adequate warning are:

Gerkin v. *Brown & Schler Co.* (1913), 177 Mich. 45, 143 N. W. 48;
McClanahan v. *California Spray-Chemical Corp.* (1953), 194 Va. 842, 75 S. E. 2d 712;
Martin v. *Maxwell-Brisco Motor Vehicle Co.* (1911), 158 Mo. App. 188, 138 S. W. 65;
Sadler v. *Lynch* (1951), 192 Va. 344;
Ebers v. *General Chemical Co.* (1945), 310 Mich. 261;
Restatement, Torts, Sec. 388;
Farley v. *Edward E. Tower Co.* and *same* v. *Standard Pyroxoloid Corp.* (1930), 271 Mass. 230, 171 N. E. 639;
Orr v. *Shell Oil Co.* (1944), 352 Mo. 288, 177 S. W. 2d 608;
Waters-Pierce Oil Co. v. *Deselms* (1909), 212 U. S. 159;
Kentucky Independent Oil Co. v. *Schaitzler* (1925), 208 Ky. 507, 271 S. W. 570;
Hopkins v. *E. I. du Pont de Nemours & Co.* (3d Cir. 1952), 199 F. 2d 930.

Notice to the intervenor is not necessarily notice to the public or ultimate consumer, as was held in *Kentucky Independent Oil Co.* v. *Schnitzler*, *supra*. In discussing *Carter* v. *Yardley & Co.* (1946), 319 Mass. 92, 64 N. E. 2d 693, it is said, in 164 ALR 372, 373:

"But whatever may be the underlying theory of liability of a manufacturer or other supplier, it is important to observe that there is present the implication that the act of the intervening purchaser or the middleman, that is, the mere act of use or resale, does not constitute a superseding cause relieving the manufacturer or supplier of liability for his original negligence. Thus, in a sense, the question here presented is whether the further factor of knowledge on the part of the intervening purchaser of the danger or defect in the article involved, or his failure to discover it or inspect therefor, is a sufficient addition to the existing intervening act of use or resale, to make it a superseding intervening cause."

The question thus raised is answered in 164 ALR 373, where the article is inherently dangerous, in this way.

". . . the courts without discussing the question of superseding or independent intervening cause, apparently have proceeded upon the theory that since the exception to the 'general rule' permitting recovery by a remote purchaser or other third person, despite the absence of any contractual relationship, is based upon a failure of the vendor to exercise the care with which he is charged for the purpose of preventing injury to such persons, and which necessarily continues through the period of intervening possession by others, liability becomes established or absolute upon an injury due to his negligence in this regard, irrespective of the knowledge of the defect or danger on the part of the intervening purchaser, or his failure to discover it or inspect therefor."

Question III. To a jury ignorant of the general subject of what constitutes an independent intervening cause sufficient to break the chain of causation originated by a defendant's negligent act, an instruction by the court, as was given here, that the plaintiffs were

entitled to recover unless the chain of causation was broken by an intervening cause, without explaining that, even without actual negligence or knowledge of the deleterious effects of tri-processed meal, the defendant was in law guilty of actionable negligence by reason of its violation of the Federal Food, Drug, and Cosmetic Act in shipping tri in interstate commerce unlabeled and without labeling, would be meaningless and confusing. The Act was an essential part of a complex set of circumstances which the jury was required to take into consideration in determining the question of intervening cause, whereas the court's mention of only the letter of July 21 (Ex. 35, R. 290) and the conflicting testimony of Ford and Armstrong relating thereto by clear implication excluded all other preceding circumstances from the jury's consideration on that issue. That, in such cases *all* of the relevant circumstances leading up to the final act which causes the injury should be considered by the jury in passing upon the questions of proximate cause and alleged independent intervening cause, is emphasized by an outstanding decision of the Supreme Court of Hawaii, the *lex loci delicti*. The Hawaii court, in *Ward* v. *I. I. S. N. Co.* (1914), 22 Haw. 66, 71, 72, after quoting with approval from the opinion of Mr. Justice Strong in *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469, 474, thus:

> ". . . In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.".

went on to discuss the question of independent intervening cause, saying:

> ". . . it is also true, that where there is an 'intermediate cause disconnected from the primary fault', such as an intervening human agency, 'self-operating,' which comes between the act of negligence and the injury, the negligence alleged is not the proximate cause of the injury, unless a reasonable and prudent person should have foreseen that his negligent act would set the intervening cause or human agency in motion. The crucial question, the pivotal fact, in the case at bar is, therefore, whether the 'primary fault,' the negligence of the defendant, and the injury of the plaintiff are 'naturally and probably connected with each other by a continuous sequence, or dissevered by a new and independent agency.' This is not a question of science or legal knowledge, but a question of fact for a jury to *'answer in the light of all the attending circumstances, and in accordance with common sense and understanding.'* [citing cases.]" (Empahsis supplied.)

And on this point, the Massachusetts court held, in *Annie M. Thornhill v. Carpenter Morton Co.* (1915), 220 Mass. 593, 597, 598:

> "It is settled that, whether the defendant was responsible in damages to the plaintiff because of the inherently dangerous properties of its article, denominated a stain of which no notice was given and of which the purchaser had no knowledge, was upon *all the evidence in the record a question of fact for the jury under appropriate instructions.*" (Emphasis supplied.)

It was important that the jury be made to understand that proximate cause need not be the sole cause of the injuries—that it may be either the sole or a

concurring cause contributing to the result. *Boden* v. *Harter* (1931), 41 S. W. 2d 920, 240 Ky. 138; *Reilly* v. *Buster* (Tex. Civ. App., 1932), 52 S. W. 2d 521, 524. Where several causes concur to produce certain results either cause may be termed the proximate cause if it is an efficient cause of the result in question. *Young* v. *Syracuse B. & N. Y. R. Co.* (1899), 61 NYS 202, 204. The law of causation in Hawaii is that the jury is to decide the question. The rule is stated in *Hughes* v. *McGregor* (1916), 23 Haw. 156, 158, 159, in this language:

> "Where one of two or more acts of negligence may be the proximate cause of an injury, or where there is any doubt as to the proximate cause, the question is to be left to the jury * * *."

See, also, *Martin* v. *Wilson* (1915), 23 Haw. 74.

The instructions requested by petitioners, which were virtually totally ignored and denied by the trial court, would have informed the jury as to these important elements to be considered.

The rule that violation of statutes such as the Federal Food, Drug, and Cosmetic Act, constitutes negligence *per se* is well stated in *Osborne* v. *McMasters* (1889), 40 Minn. 103, 104, 105:

> "It is now well settled, certainly in this state, that where a statute or municipal ordinance imposes upon any person a specific duty, for the protection or benefit of others, if he neglects to perform that duty he is liable 'to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect.'"

"It is immaterial whether the duty has been imposed by the rule of common law requiring the exercise of ordinary care not to injure another, or is imposed by a statute designed for the protection of others. In either case the failure to perform the duty constitutes negligence, and renders the party liable for injuries resulting from it. The only difference is that in the one case the measure of legal duty is to be determined upon common-law principles, while in the other the statute fixes it, so that the violation of the statute constitutes conclusive evidence of negligence, or in other words, negligence *per se*."

The rule is similarly stated in *Pine Grove Poultry Farm Inc.* v. *Newtown By-Products Mfg. Co.* (1928), 248 N. Y. 293, 162 N. E. 84, 85:

"The right to maintain an action for the breach of a statutory duty is not restricted to one suffering an injury to the person. Property rights also come within the protection of a statute imposing a duty for the benefit of the general public. Such a rule has been applied by us to a violation of the Farms and Market Law in a case where no privity of contract existed between the party guilty of the violation and the one incurring the damage. No element of ordinary negligence is essential. Violation of the statute becomes actionable default."

In *Tate* v. *Mauldin* (1930), 157 S. C. 392, 397, 154 S. E. 431, 433, the court quoted with approval from 26 C. J. 783, 785 as follows:

"(2) If a manufacturer of a food product disobeys the prohibition or neglects to perform the duty imposed by a pure food statute, negligence is implied from such violation or neglect, and he is liable for injuries resulting from the unwholesomeness of such food product regardless of his knowledge of its unwholesomeness."

In *Gantt* v. *Columbia Coca-Cola Bottling Co.* (S. C. 1940), 7 S. E. 2d 641, 643, 644, the court said:

> ". . . If therefore, it is found from the preponderance of the evidence that the bottle of coca-cola in question was bottled and sold by the defendant company, and that it contained at the time of the sale and delivery thereof by the company the alleged poisonous or deleterious matter, this would be a violation of the statute, and therefore, negligence per se. It then follows that evidence tending to show a violation of the statute, or negligence per se, would require the submission of the case to the jury, so far as negligence is concerned, although there was no other evidence of negligence, either direct or circumstantial."

In an action under the Federal Food and Drug Act of 1906, the court in *Armour* v. *Wanamaker* (CCA 3, 1913), 202 Fed. 423, 424, said:

> "The proofs on behalf of the plaintiffs, which was the only testimony in the cases, tended to show that Mrs. Armour, the decedent, a few days before her death, bought in defendant's store in Philadelphia hair tonic contained in a bottle closed with a tight ground glass stopper. The bottle was labeled as being an 'Extract from Herbs, Roots and Flowers,' but in reality about 60 per cent. to 80 per cent. of it was alcohol. Under the legislative definition of section 8 of the federal Food and Drug Act of 1906, this bottle was misbranded, in that said section provides that there is a misbranding, 'in case of drugs . . . if the package fail to bear a statement of the quantity or proportion of any alcohol . . . contained therein.' The proofs also tended to show that, in further contravention of the provisions of section 2 of said act, which provides 'that the introduction into any state . . . from any other state . . . of any . . . drugs . . . which is misbranded, is hereby prohibited,' the defend

ant delivered said misbranded bottle to the purchasers home in New Jersey. The omission of the defendant to properly brand, as required by statute, this bottle as containing alcohol, and the introduction of the package into an interstate commerce prohibited by the act, clearly afforded competent evidence for submission to a jury on the question of defendant's negligence. The principle is clear that the omission to fulfill a statutory imposed obligation creates statutory negligence."

Other cases holding that the violation of a statute such as the Federal Food, Drug, and Cosmetic Act constitutes negligence *per se*, are:

Donaldson v. Great Atlantic and Pac. Tea Co. (Ga. 1938), 199 S. E. 213, *supra;*
Whatley v. Henry (Ga. 1941), 16 S. E. 2d 214, 219; 65 Ga. App. 668;
Crist v. Fitzgerald (1949), 189 Va. 109;
Mossrud v. Lee (1916), 163 Wis. 229, 157 N. W. 758;
Swoboda v. Brown (1935), 129 Oh. St. 512, 196 N. E. 274;
Meyer v. Cincinnati St. Ry. (1951), 89 Oh. App. 169, 100 N. E. 2d 437.

Question IV. Petitioners were not foreclosed by Rule 51, read with Rule 46, F. R. C. P., from claiming error in the refusal of all of their offered instructions except a portion of one.

The decision of the circuit court of appeals is far from clear as to the grounds upon which it is based. The court first appears to be discussing the case on the merits, which would be entirely unnecessary if the petitioners (plaintiffs below) are foreclosed under Rule 51 from raising any question based on failure to

give petitioners' requested instructions; but in the penultimate paragraph of the decision, the court says:

> "... The only objection of the appellants to the instructions given by the court, made before the jury retired to consider its verdict, was directed to the question of prospective damages." (R. 570).

The facts, as they apply to these petitioners' requests for instructions are stated in the STATEMENT OF FACTS, ante, pp. 36-8. As will appear therefrom, when petitioners' counsel presented their 20 written requests for instruction, the court was in chambers and no record was made of the proceedings therein. The court then, without reading the requested instructions or even allowing petitioners' counsel to argue the same, walked out of chambers into the court room, and, without even waiting for petitioners' counsel to reenter the court room, proceeded to give its oral charge to the jury before the argument. The court, however, had never made any ruling on the requested instructions, and did not make one until, as shown by the record (R. 499-500) right after the jury had retired. Then, for the first time, the court stated that it was denying all petitioners' requested instructions. Immediately thereafter, and at the earliest possible opportunity to do so, the petitioners duly excepted to such ruling (R. 500). To say the least, this trial court's manner of operating left all counsel more or less open-mouthed and dazed, three of the four attorneys representing petitioners at the trial being from other jurisdictions where the trial practice was entirely more orthodox and regular.

Whereas, Rule 51 provides in part:

> "Rule 51. Instructions to Jury: Objection ... No party may assign as error the giving or the failure to give an instruction unless he objects

thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.";

Rule 46 provides:

> "Rule 46. Exceptions Unnecessary
> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to make or his objection to the action of the court and his grounds therefor; *and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.*" (Emphasis supplied.)

The failure of the trial court to give the 20 requested written instructions—*all but a part of one of them*—is, we submit, an error so grave that a miscarriage of justice may occur if Rule 51 is literally applied without regard to Rule 46. This court may, on its own motion, consider and reverse for such error.

> "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. See *Johnson* v. *United States*, 318 U. S. 189, 200. But there are exceptions to that rule. *United States* v. *Atkinson*, 297 U. S. 157, 160; *Clyatt* v. *United States*, 197 U. S. 207, 221-222. And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion." *Screws* v. *United States* (1945), 325 U. S. 91, 107.

In *Fuller* v. *King, et al.* (6-CA, May, 1953), 204 F. 2d 586, 591, the rule is stated thus:

> "Although no formal exception was taken by appellants to the failure of the Trial Judge to give such qualifying instructions we are of the opinion that the matter had been sufficiently called to his attention prior to the giving of the instructions to have necessitated such action on his part."

A similar ruling by the United States Court of Appeals for the District of Columbia was laid down in the following language:

> "The appellant did not strictly comply with F. R. C. P. Rule 51, 28 U. S. C. A., which provides that 'No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict. . . .' But the court had repeatedly stated its view of the law in the course of the trial and had repeatedly prevented appellant's counsel from proceeding on the opposite view. 'The purpose of exceptions is to inform the trial judge of possible errors so that he may have an opportunity to reconsider his rulings and, if necessary correct them.' *Sweeney* v. *United Feature Syndicate*, 2 Cir. 129 F. 2d 904, 905-906. It would have been only a formality for counsel to ask the court, at the end of the trial, to reverse itself. An error in instructing a jury may be raised by an appellate court, when justice seems to require, even though it cannot be raised by the appellant. Shokuwan Shimabukuro v. Higeyoshi Nagayama, 78 U. S. App. D. C. 271, 140 F. 2d 13." *Harlem Taxicab Ass'n.* v. *Nemesh*, 89 U. S. App. D. C. 123 (June 7, 1951), 191 F. 2d. 459, 461.

See, also, to the same effect, *Louisville and Nashville Railroad Co.* v. *Farmer*, 6 CA (1955), 220 F. 2d 90, 96; *Callen* v. *Pennsylvania R. Co.* (1947), 162 F. 2d 832.

Last, but not least, we cite the following excerpt from *Montgomery* v. *Virginia Stage Lines* (U. S. App. D. C. June 28, 1951), 89 U. S. App. D. C. 213, 216, 191 F. 2d 770, 773, which is squarely in point on the facts:

> "A few moments prior to argument to the jury counsel for plaintiff stated, 'If Your Honor please, I have some special prayers which I would like to present.' The court responded, 'Submit your instructions in writing and I will pass upon them.' There ensued a brief discussion about the time likely to be consumed in argument. Then, as the transcript indicates, the arguments were made, followed by a short recess, whereupon the court instructed the jury. It does not appear when the requested instructions were submitted or acted upon, except that they bear the notations to which we have referred, dated the last day of the trial. If they were submitted after the charge was made, or if they had been previously submitted and were pending and unacted upon when the charge was completed, objections to their denial should be deemed to have been made after the charge, reading Rule 51 with Rule 46. That these Rules should be considered together is held in Wright v. Farm Journal, 2 Cir., 1947, 158 F. 2d 976, where a request for a 'further instruction' is considered equivalent to an objection for purposes of Rule 51. To like effect is Williams v. Powers, 6 Cir., 1943, 135 F. 2d 153, 156, where it is said: 'Rule 51 should be read in conjunction with Rule 46. The purpose of these rules is to inform the trial judge of possible errors, that he may have an opportunity to consider his rulings and if necessary to correct them, and where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient . . .'".

Question V. The Federal Food, Drug, and Cosmetic Act creates a new and independent federal civil cause of action based on failure by a manufacturer or distributor of articles sold or distributed in interstate commerce to adequately perform the duty of placing labels on his product or labeling so as to adequately warn all foreseeable users of the potential dangers of using the product for the purposes for which it was manufactured or distributed.

We have been unable to find any federal decision which squarely considers the question whether, under the Federal Food, Drug, and Cosmetic Act, a new and independent federal civil cause of action is created, which would authorize suing in a federal court on the basis of a federal question, as distinguished from the situation in a diversity case. It is believed that the mounting complexity and diversity of the problems posed in this technological age of discovery, experimentation, mass production and mass distribution, with the use of myriads of new substances, devices and processes, and combinations of the same, compounded by the varying provisions and interpretations of state and local laws (See, for instance, Kerr, A Study in Confusion, Food, Drug, Cosmetic L. J. 12:99, Feb. 1957) make it imperative that the paramount intent and policy of that federal Act be given the maximum scope and effect through uniform interpretation and enforcement throughout the country, rather than being subject to the vicissitudes of varying state rules of law and procedure which could well thwart that intent and policy. This can be done by holding that a new and independent federal civil cause of action is created by the Act, allowing action in the federal courts untrammeled by State policy, which is often unduly restrictive. The degree of enforcement of this Act,

should not depend upon the vagaries of State policy, as determined by the legislature and courts of each State.

> "Generally.—The primary wrong upon which a cause of action for negligence is based consists in the breach of a duty on the part of one person to protect another against injury, the proximate result of which is an injury to the person to whom the duty is owed. These elements of duty, breach, and injury are essentials of actionable negligence. In the absence of any one of them, no cause of action for negligence will lie." *38 Am. Jur. Negligence 651-2, Sec. 11.*

Since there was no common law requirement of affixing labels, or labeling articles, the duty to label or of labeling must depend for its creation upon the Federal Food, Drug, and Cosmetic Act, and other similar laws of the various States, the Territory of Hawaii and other local jurisdictions. Since such an act creates one of the indispensable elements for recovery on the stated theory of negligence or on any other theory, it is idle to say that such an act does not create a new cause of action. Without the act there would be no recovery. Under or because of the act, recovery is allowed. We are asking this court to recognize the actual fact that the Federal Act in fixing the arbitrary requirements of labels and labeling for goods shipped in interstate commerce created a duty, the breach of which created for the first time, a liability to a person injured thereby, and so in fact created a federal cause of action.

Decisions subsequent to *Erie Railroad* v. *Tompkins* have recognied that application of the rule of that case to the interpretation and enforcement of federal statutes would destroy, rather than promote, uni-

formity of construction and enforcement which is the end considered desirable in that case.

Picking v. *Pennsylvania R. Co.* (3d Cir. 1945), 151 F. 2d 240, 251;
Sibbach v. *Wilson & Co.* (1941), 312 U. S. 1;
Sola Electric Co. v. *Jefferson Co.* (1942), 317 U. S. 173;
Philco Corp. v. *Phillips Mfg. Co.* (CCA 7, 1943), 133 F. 2d 663;
Stephenson v. *Grand Trunk Western R. Co.* (CCA 7, 1940), 110 F. 2d 401, Cert. Den. 311 U. S. 720.

Enforcement pursuant to federal laws and the rules laid down by federal courts is the only way to secure uniformity of interpretation and enforcement and to avoid split-hair decisions on conflict-of-laws and other rulings of state courts which unduly complicate enforcement of a federal law and policy already being strained by modern conditions of manufacture, distribution and technology. Elements of atoms and electrons are today being added, removed, or transmuted, to create new substance, not heretofore known and the qualities and effects of which are unknown and may not be known until after long experimentation and experience; radiation and other processes add properties to these substances which are utterly imperceptible except through tests by highly complicated special instruments or processes. New antitoxins and drugs are being mass-administered on a nation-wide basis. They are largely covered by the Food, Drug, and Cosmetics Act and other similar acts. If those acts are within the power of Congress, as they undoubtedly are, in so far as they deal with articles affecting or affected by interstate commerce, and if they create duties to the general public, which is even more helpless against these new substances than before and therefore needs

even greater protection than previously, and if those duties are to be properly enforced so as to give to the public the protection intended, it is essential that the federal Act be uniformly interpreted, construed and enforced throughout the entire country, and not be affected by the vagaries of local law, statutory and judicial.

CONCLUSION

It is urged that this petition for a writ of certiorari should be granted so that the serious errors hereinbefore pointed out may be corrected, the important and novel question hereinabove raised may be resolved, and the existing confusion in enforcement of the rights created by the Federal Food, Drug, and Cosmetic Act may be alleviated.

Respectfully submitted,

ROGER E. BROOKS,
923 20th Street, N. W.,
Washington 6, D. C.

C. NILS TAVARES,
Alexander & Baldwin Building,
Honolulu, Hawaii

PRATT, TAVARES & CASSIDY,
Alexander & Baldwin Building,
Honolulu, Hawaii

KASHIWA & KASHIWA,
401 Trustco Building,
Honolulu, Hawaii

WILLIAM G. BURGIN, JR.,
516 North Second Avenue,
Columbus, Mississippi.

Of Counsel

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16140

GEORGE T. NISHIDA and JAMES E. NISHIDA d/b/a HILO DAIRY COMPANY OF KAUAI; RYOJU SOKEI, d/b/a SOKEI DAIRY, and FRED L. WALDRON, LIMITED, *Appellants*,

versus

E. I. DU PONT DE NEMOURS & COMPANY, *Appellee*.

Appeals from the United States District Court for the Northern District of Mississippi

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(June 20, 1957)

Before RIVES, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: L. L. Ford had for some years been in the field of processing soybean oil and soybean meal by an oil extraction process, using a solvent known as hexane which is derived from petroleum. In 1950 Ford and others began the construction of a mill for the extraction of oil from soybeans. The appellee, E. I. du Pont de Nemours & Company, had developed and marketed a chemical solvent for processing soybeans known as trichloroethylene. This product was known to the trade as "tri" and our consideration for typists, typesetters and proofreaders induces us to refer to it, wherever we can, by its three-letter designation. The du Pont Company was referred to Ford by Iowa State College. du Pont

stressed the advantages of tri as a solvent, it being non-volatile and of extremely high recovery. Ford and his associates were furnished with technical information and advice by du Pont during the planning and building of the mill. While the mill was under construction Ford and his associates formed a corporation under the name of Magnolia Soy Products Company. The Corporation took over the mill. The mill was completed and the production of soybean meal was commenced in March of 1951, using tri as a solvent for the extraction of oil from soybeans. The soybean meal was sold for cattle feed.

The use of tri in the processing of soybean meal was not new, and the harmful effect of tri-extracted meal had occasionally been suspected. In 1916 a report known as the Stockman Report discussed the death of cattle in Scotland after being fed tri-extracted soybean meal. Stockman concluded that tri itself in comparatively large doses was not poisonous to cattle but that in the process of extracting the oil from soybean a poisonous substance was formed and he recommended that this method be discontinued. In the 1930's experiments at Cornell University were financed by du Pont and conducted by Dr. Vollersten to determine the effect of tri-extracted soybean meal upon cattle. He concluded that the tri process, properly operated, did not produce a dangerous product. In Iowa and Colorado there was an outbreak of a hemorrhagic cattle disease similar to those discribed in the Stockman report and in the report of Dr. Vollersten on the Cornell experiment. In August of 1950, which was before the mill of Magnolia had been constructed, Ford had a discussion with T. J. Milligan of du Pont in which Ford expressed his concern about reports he had received as to the toxicity of soybean meal extracted with tri. Ford quoted Milligan as saying there was nothing to the rumors. Ford requested a letter of assurance. Milligan wrote and in his letter referred to a "smear campaign" which he said was maligning the quality of tri-extracted soybean meal. With

the letter was an appendix. In this paper du Pont mentioned the then recent attacks of hemorrhagic cattle disease in Iowa and Colorado and related the investigations which had been made to ascertain the cause. In this appendix du Pont stated that soybean processors, veterinarians, and university veterinary faculties with whom du Pont had discussed the cases had concluded that soybean meal was probably not the cause. Also included with the letter of August 11, 1950, was a mimeographed paper captioned "Trichloroethylene Soybean Extraction". In this paper it was stated that du Pont "with its faith in the process was actively promoting its use". There it was also said, "In considering this process, we also respectfully suggest that a company with the national prominence and reputation of 'du Pont' can scarcely risk recommending a process such as trichloroethylene extraction unless we are absolutely convinced as to the quality and marketability of the product that it will produce and the cost at which it will operate".

In January of 1951 there was an outbreak of the hemorrhagic disease in Minnesota from which a number of cows and calves fed on tri-processed soybean meal died. R. Stuart Armstrong, a Solvents Technical Representative in the employ of du Pont, went to the University of Minnesota in May or June and arranged for it to conduct research into the cause of the disease with du Pont financing the program. The report of the University of Minnesota investigation was published in October of 1951 and read by Armstrong during the following month. It showed that one of two calves fed tri-extracted soybean meal died. This report was not communicated by du Pont to Magnolia.

On July 31, 1951, C. B. Shepherd, Manager of the Chlorine Products Division of du Pont, wrote to Magnolia stating that there were increasing indications that tri-extracted soybean meal might be associated with a hemorrhagic disease in cattle which had been observed in widely scattered areas. It was said that despite satisfac-

tory experiments in the past, the possibility could not be ignored that the meal might be associated with the disease. The final paragraph of the letter said:

> "In view of the present uncertainty, we strongly recommend that sales of trichloroethylene-extracted meal be confined to outlets other than cattle feed until more definite information is available from the investigations now underway in Minnesota and Iowa. To the best of our knowledge, the hemorrhagic disease in question is peculiar to cattle only, and all available evidence and experience indicates that trichloroethylene-extracted meal is entirely satisfactory as a component for feeding hogs and poultry".

This letter was delivered on August 1, 1951, by Armstrong to Ford and Reed of the Magnolia Company. There is a wide divergence between the testimony of Ford and the testimony of Armstrong as to what was said at the time of the delivery of the letter. Ford testified that he told Armstrong "here you've let us spend $500,000 building this mill and now you tell us we can't use it to manufacture feed." Ford quoted Armstrong as replying "the reason I brought it [the letter] personally was because I didn't want you to get excited about it." Ford's testimony continued, "I asked him 'does the du Pont Company know we can't operate our mill and have built one here that cost $500,000? If we can't sell it for cattle feed we can't operate it. Did du Pont tell us to shut it down? Do they have evidence?' and he said 'No, there isn't any evidence conclusive, there's rumors circulated from time to time'." Ford quoted Armstrong as saying also that so far as he knew there wasn't any evidence that tri-extracted meal had anything to do with cattle losses. Ford said he asked Armstrong point blank if du Pont would recommend the closing down of the plant because meal couldn't be sold for cow feed and gave Armstrong's reply as negative. Armstrong testified that he delivered letters such as the

one quoted to all known users of tri in soybean extraction, there being four such mills besides Magnolia. Armstrong denied making the statements attributed to him by Ford. Armstrongs testimony was that a discussion was had of the possibility of operating the mill for the production of meal for swine and poultry feeds.

In October 1951, a weekly periodical, "Feedstuffs," published for those in the business of producing and marketing feeds, reported that the Association of American Feed Control Officials had adopted a resolution discouraging the use of tri-extracted soybean meal as feed for cattle and calves until it had been proved that these products were nontoxic for such animals and that such products should be labeled with a warning prohibiting the use of such meal for cattle feed. Armstrong testified that Reed, an officer of Magnolia, had admitted seeing the publication. Subsequent to these events, Magnolia ordered and du Pont supplied it with further shipments of tri.

Fred Waldron, Ltd., a dealer in animal feeds in Honolulu, Hawaii, ordered 200 tons of soybean meal from The Broad [Brode] Corporation, of Memphis, Tennessee, which in turn ordered the meal from Magnolia. The order was filled by it. The appellants Nishida operated a dairy in Hawaii as did the appellant Sokei. These dairymen purchased from Waldron soybean meal made by Magnolia, fed it to their cattle and many of the cattle died and others became violently ill. Waldron sold meal to other cattle owners who fed it to their cattle with similar results. The Nishidas and Sokei brought suits in the court in Hawaii against Waldron for their losses and the other cattle owners who had sustained losses asserted claims against Waldron. The Nishidas, Sokei and Waldron each brought an action in the District Court for the Northern District of Mississippi against du Pont for the losses and damage claimed to have been sustained as a result of the feeding of the soybean meal. Each complaint was in three counts; count one asserted breach of an implied warranty that soybean meal

manufactured by the tri process would be fit and wholesome feed for cattle; count two set up a breach of an implied warranty to all purchasers that soybean meal so manufactured would be of merchantable quality; and count four (count three being eliminated) being based on negligence. The cases were consolidated for trial.

At the close of the evidence and after motions for directed verdicts for the defendant had been made and denied, the court gave its charge to the jury. The court instructed the jury that du Pont had collaborated with those who had built the Magnolia mill and represented to them that tri-processed soybean meal was a safe product for the feeding of cattle; that after such representations Magnolia manufactured meal which was ultimately fed by the Nishidas, by Sokei and others to cattle and as a result of such feeding cattle died and no reasonable man could come to any other conclusion; and that, though the chemical reaction had not been ascertained, the feeding of tri-extracted soybean meal does kill cattle. The court told the jury that the case was to be determined by what the jury thought of the factual situation with respect to the letter written by Dr. Shepherd and delivered by Mr. Armstrong to Magnolia early in August, 1951. After mentioning that the jury would recall what the letter said, the court said, "That, by the defendant is alleged to have broken the chain of causation from the legal standpoint in this case. If it did not break the chain of causation from the legal standpoint in this case, I think your verdict would bound to be for the plaintiffs in this case. If it did break the chain of causation then your verdict should be for the defendant in this case". If, said the court, the actions of the defendant were not such as would have caused a reasonably prudent man to desist in the selling of tri-processed soybean meal for cattle feed, or were such that it knew or should have known that Magnolia would continue to sell such meal for cattle feed without regarding such sales as extraordinary, then the jury should find for the

plaintiffs. The court pointed out to the jury the conflicts between the testimony of Ford and that of Armstrong. Instructions were given as to the burden of proof and upon damages. At the conclusion of the court's charge an objection was made by one of the attorneys for the defendant to a portion of the court's instructions, and the objection was overruled. Counsel for the plaintiffs then stated, "For the record, your Honor, may we most respectfully raise the question of law by excepting to the court's ruling, ruling out possible prospective profits?" The court responded, "Yes, sir, you may do that." The case was argued to the jury and the jury retired to begin its deliberations. While the jury was out counsel for the plaintiffs made the statement, "And may it please Your Honor, may we be permitted to except to the court's ruling in denying the submission of the proposed instructions to the jury." The court then said, "Oh certainly, gentlemen, you may have an exception to that. You have a right to except to any ruling of the court." The jury returned a verdict for the defendant. Motions for a new trial were overruled and judgments for the defendant were entered.

The appellants, plaintiffs in the district court, have twenty-one specifications of error. It is stated that the verdict of the jury is contrary to the overwhelming weight of evidence, that the verdict is contrary to law, and that the court erred in admitting certain evidence over the appellants' objection. The other specifications of error, eighteen in number, relate to the court's instructions to the jury. The appellants do not designate the evidence which they believe was erroneously admitted either in their specifications of error or in their briefs. We shall treat the question as abandoned.

The court instructed the jury that the determinative question in the case arose with respect to the letter of du Pont to Magnolia written in July, 1951, and delivered August 3, 1951; that if the letter did not break the chain

of causation the verdict should be for the plaintiffs; and that if it did break the chain of causation the verdict should be for the defendant. These instructions eliminated from the case any question as to whether it had been shown that the tri-processed meal was the cause of the death and disease of the cattle. The issue submitted to the jury was as to whether there was an intervening cause in the conduct of Magnolia which relieved du Pont from such liability as it would otherwise have had.

In 1954 the Supreme Court of Mississippi decided *E. I. du Pont de Nemours Company* v. *Ladner*, 221 Miss. 378, 73 So. 2d 249. Ladner bought soybean meal from one Thigpen, a retail feed dealer and fed it to his cattle and five of them died. The meal was processed by Magnolia with the use of tri as a solvent and sold by Magnolia to the dealer in the fall of 1951 and delivered to him about November 11th of that year. Ladner sued Magnolia and du Pont. Magnolia made a settlement and the cause was dismissed as to it. Upon a trial the testimony of Ford as to the discussion with Armstrong was the same as in the case here decided, in fact in this case a transcript of Ford's testimony in the Ladner case was, by agreement, used in lieu of a deposition or other testimony by Ford. Ladner recovered a judgment. The Supreme Court of Mississippi reversed and held that the warning letter was clear and du Pont was not liable for the failure of Magnolia to heed the warning. The rule of law applicable was quoted from American Jurisprudence and is thus stated:

> "One who acts negligently is not bound necessarily to anticipate that another person will be negligent after the latter has discovered the danger arising from the former's negligence. The first actor, however, is not permitted to assume that the second actor will discover the danger caused by the first actor's negligence. Accordingly, where the second actor after having become aware of the existence of a potential danger created by the negligence of the first actor, acts

> negligently in respect of the dangerous situation and thereby brings about an accident with injurious consequences to others, the first actor is relieved of liability, because the condition created by him was merely a circumstance and not the proximate cause of the accident." 38 Am. Jur. 731, Negligence, par. 72.

The Mississippi court held as a matter of law, as was found by the jury in the case before us as a matter of fact, that the sales by Magnolia of the tri-processed meal for cattle feed after being warned was an intervening act which broke the chain of causal relationship between du Pont's negligence and the injury to the cattle. The Mississippi court said:

> "After R. Stewart Armstrong had delivered Du Pont's warning letter to Ford and Reed on August 3, 1951, Du Pont had a right to believe that Magnolia would confine its sales of tri-extracted soybean meal to outlets other than cattle feed until more definite information was available from the investigations then under way. Du Pont had a right to believe that the warning letter would not be disregarded; and we think that Magnolia's conscious act in refusing to heed the warning and in selling the carload of tri-extracted soybean meal to Thigpen for cattle feeding purposes after being apprised of the potential danger, constituted an independent, efficient intervening cause, which was not foreseeable by Du Pont, or, in other words, constituted a superseding cause of the injury operating to eliminate Du Pont's responsibility for its original negligence, if there was such negligence in fact." *E. I. Du Pont de Nemours & Co.* v. *Ladner*, 73 So. 2d 249, 256.

The doctrine as to intervening cause has been set forth in these words:

> "The connection between the defendant's negligence and the plaintiff's injury may be broken by

an intervening cause. Intervening cause is merely proximate cause flowing from a source not connected with the party sought to be charged. While the term may have some descriptive value, unduly elaborate discussion of intervening cause as such tends to becloud rather than clarify the relatively simple idea of causal connection. When it is determined that a defendant is relieved of liability by reason of intervening cause, it would appear to mean simply that the negligent conduct of someone else—and not that of defendant—is the proximate cause of the event.

"When the natural and continuous sequence of causal connection between the negligent conduct and the injury is interrupted by a new and independent cause, which itself produces the injury, that intervening cause operates to relieve the original wrongdoer of liability. The original negligent conduct, while a cause of the injury, is merely a remote and not a proximate cause thereof." 1 Shearman & Redfield on Negligence, Rev. Ed. 99, § 37.

Du Pont acquired knowledge of the dangers of feeding tri-processed soybean meal to cattle and it might be assumed that, prior to the warning letter, Magnolia was without such knowledge or not as aware of the dangers as du Pont was or should have been. Under such circumstances du Pont was under a duty to warn Magnolia of the risks. See 1 Shearman & Redfield on Negligence, Rev. Ed. 64, § 26. Prosser on Torts, 2d Ed. 504. It follows, of course, that when a warning is given the original manufacturer or supplier, here du Pont, is not liable. See *Ford Motor Company* v. *Wagoner*, 183 Tenn. 392, 192 S. W. 2d 840, 852, 164 A.L.R. 364, and the cases cited in the A.L.R. annotation.

Unless the verdict is contrary to the great weight of evidence, it will not be disturbed on appeal. *Flewellen* v. *Logan*, 5 Cir., 1939, 106 F. 2d 151; *Travelers Insurance Co.* v. *Warrick*, 5 Cir. 1949, 172 F. 2d 516; *Good Holding Co.*

v. *Boswell*, 5 Cir. 1949, 173 F. 2d 395; cert. den. 338 U. S. 815, 70 S. Ct. 55, 94 L. Ed. 493; *Atlantic Coast Line R. Co.* v. *Mims*, 5 Cir. 1952, 199 F. 2d 582. This is also the rule in Mississippi. *Yazoo & M.V.R. Co.* v. *Smith*, 188 Miss. 856, 196 So. 230. There was ample evidence to sustain the verdict for du Pont on the issue of intervening cause. We need not determine whether, had the verdict and judgment been for the appellants, we would be required to reverse under the rationale of the Ladner case.

The appellants requested twenty separate instructions to the jury. They urge error in that they were not given and in the charges of the court as given. Some of the instructions requested, such as those involving violations of the Federal Food, Drug and Cosmetic Act and the Hawaii Food, Drug and Cosmetic Act, had no materiality in view of the instruction that the verdict should be for the appellants unless the chain of causation was broken. The court's charge as given covered all of the matters included in appellants' requested charges which were pertinent to the issues submitted. The only objection of the appellants to the instructions given by the court, made before the jury retired to consider its verdict, was directed to the question of prospective damages. In an oral opinion given by the district judge in overruling the appellants' motion for a new trial the view was expressed that the appellants had been confined to a too narrow gauge of estimate of damages but since the jury found no damages the error, if any, was harmless. We are in accord with this view.

We think that in all respects the instructions dealing with liability fairly presented the issues. No reversible error appears either in the instructions given or in those refused. See *Good Holding Co.* v. *Boswell, supra; Atlantic Coast Line R. Co.* v. *Mims, supra.*

Since we find no error prejudicial to the appellants the judgment is

AFFIRMED.

Judgment

In the United States District Court for the Northern District of Mississippi, Greenville Division

Civil Action No. 142

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v.

E. I. Du Pont de Nemours & Company, a corporation, Defendant.

This cause came on for trial before the Court and a jury, beginning on November 22, 1955, and continuing to and on November 29, 1955 (the intervening Thanksgiving and Sunday excepted), and the issues having been duly tried, and the jury on November 29, 1955, having rendered a verdict for the Defendant, it is hereby

Ordered and Adjudged, that Plaintiffs take nothing by their action, that the Defendant, E. I. du Pont de Nemours & Company, have judgment on the verdict against the Plaintiffs, George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, and that said Defendant have and recover from said Plaintiffs its costs in the action.

Dated Dec. 2, 1955.

By the Court:

HERBERT D. STEPHENS, JR.,
Clerk.

Order

In the United States District Court for the Northern District of Mississippi, Greenville Division

Civil Action No. 142

George T. Nishida and James E. Nishida, d/b/a Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v.

E. I. Du Pont de Nemours & Company, Defendant.

This day this cause coming on to be heard on the Motion for a New Trial as filed by the Plaintiffs herein, and the Court having read and considered said Motion and heard and received arguments of counsel for the Plaintiffs and Defendant thereon, and being of the opinion that neither said Motion nor the grounds thereof are well taken and that said Motion should be denied, and premises considered;

It Is Therefore Ordered and Adjudged that the Motion for a New Trial, as filed by Plaintiffs herein, George T. Nishida and James E. Nishida, d/b/a Hilo Dairy Company of Kauai, a co-partnership, be, and the same is, hereby denied.

Ordered and Adjudged this 2nd day of February, A. D. 1956.

ALLEN COX,
United States District Judge.

C.O.B. 1, Page 304.

Plaintiffs' Request for Instructions

In the United States District Court for the Northern District of Mississippi, Greenville Division

Civil Action No. 142

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v.

E. I. Du Pont De Nemours & Company, Defendant.

Civil Action No. 145

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,

v.

E. I. Du Pont De Nemours & Company, a Corporation, Defendant.

Civil Action No. 143

Fred L. Waldron, Limited, Plaintiff,

v.

E. I. Du Pont De Nemours & Company, a Corporation, Defendant.

Come now plaintiffs above mentioned and hereby respectfully request that the following instructions No. 1 to No. 20 be given to the jury in the above-entitled causes.

Dated: November 29th, 1955.

PRATT, TAVARES & CASSIDY,
SHIRO KASHIWA,
INGMAN & INGMAN,
WILLIAM G. BURGIN, JR.,
ROGER E. BROOKS,

By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiffs.

Plaintiffs' No. 1

The Court instructs the jury that throughout these instructions, to follow, unless it is specifically stated in any instruction that it applies only to a particular case mentioned, the instruction applies to all three cases.

Plaintiffs' No. 2

The Court instructs the jury that the care of a prudent man varies according to circumstances dependent upon the degree of danger. What is the precise legal intent of the term "ordinary care" must, in the nature of things, depend upon the circumstances of each individual case. It is a relative and not an absolute term. The degree of care and foresight which is necessary in any given case must always be in proportion to the nature and magnitude of the injuries and damages which might result from the occurrence which is to be anticipated and guarded against.

Plaintiffs' No. 3

The Court instructs the jury that under the Federal Food, Drug and Cosmetic Act the causing of the introduction into interstate commerce of soy bean oil meal which is known to be intended for cattle feed and which is unfit for cattle feed is prohibited.

The said Act further prohibits the shipment in interstate commerce of tri solvent which the sender knows may become a component part of feed that is unfit for cattle and is intended to be sold for cattle feed.

The said Act further prohibits the shipment of tri solvent in interstate commerce unless the container thereof bears a label specifically informing prospective users as to its safe use.

The material provisions of this Act are attached to this instruction.

The Court instructs the jury that the Federal Food, Drug and Cosmetic Act provides, as material herein, as follows:

"Sec. 31. The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded and the delivery or proffered delivery thereof for pay or otherwise.

(d)—

"Sec. 201. For the purposes of this Act—

(a) The term "Territory" means any Territory or possession of the United States—.

(b) The term "interstate commerce" means (1) commerce between any state or territory—.

(e) The term "person" includes individual partnership, corporation—.

(f) The term "food" means (1) articles used for food or drink for man or other animals (2) chewing gum, and (3) articles used for components of any such article.

(g) The term "drug" means (1) articles recognized in the official United States Pharmacopocia.

(k) The term "label" means a display of written, printed or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this act that any word, statement or other information appearing on the label shall not be considered

to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

(m) The term "labeling" means all label and other written, printed or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

(n) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in labeling thereof or under such conditions of use as are customary or usual.

(p) The term "new drug" means—

(1) Any drug the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety of drugs, as safe for use under the conditions prescribed, recommended, or suggested in the labeling thereof, except that such a drug not so recognized shall not be deemed to be a "new drug" if at any time prior to the enactment of this Act it was subject to the Food and Drugs Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning the conditions of its use—

Sec. 303. (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and

shall on conviction thereof be subject to imprisonment for not more than one year or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both imprisonment and fine.

Sec. 402. A food shall be deemed to be adulterated—(a)(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of section 406; (406(a) reads as follows:

Sec. 406. (a) Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2) of section 402(a);)

or (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held, under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;—

Sec. 403. A food shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular. (f) If any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such

terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

Sec. 502. A drug or device shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular. (c) If any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use. (f) Unless its labeling bears (1) adequate directions for use;—(j) If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof.

Sec. 505(a) No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an application filed pursuant to subsection (b) is effective with respect to such drug.

(b) Any person may file with the Secretary an application with respect to any drug subject to the provisions of subsection (a). Such persons shall submit to the Secretary as a part of the application (1) full reports of investigations which have been made to show whether or not such drug is safe for use; (2) a full list of the articles used as components of such drug; (3) a full statement of the composition of such drug; (4) a full description of the methods used in, and the facilities and controls used for, the manufacture, processing and packing of such drug; (5) such samples of such drug and of the articles used as components thereof as the Secretary may require; and (6) specimens of the labeling proposed to be used for such drug.

(c) An application provided for in subsection (b) shall become effective on the sixtieth day after the filing thereof

unless prior to such day the Secretary by notice to the applicant in writing postpones the effective date of the application to such time (not more than one hundred and eighty days after the filing thereof) as the Secretary deems necessary to enable him to study and investigate the application.

Plaintiffs' No. 4

The Court instructs the jury that if you find by a preponderance of the evidence that the defendant, in shipping tri solvent in interstate commerce to Magnolia Soy Products Company in the manner and at the times shown by the evidence violated the Federal Pure Food, Drug and Cosmetic Act, then by reason of such violation, the defendant was guilty of negligence as a matter of law in so shipping such tri solvent, and, unless you further find that the defendant was exonerated by an intervening cause, as covered by other instructions, then your verdict should be for the plaintiffs.

Plaintiffs' No. 5

The Court instructs the jury that if you find by a preponderance of the evidence that, in or as a result of shipping tri solvent in interstate commerce to Magnolia Soy Products Company, the defendant violated any provision of the Federal Food, Drug and Cosmetic Act, such violation is evidence, to be considered with all other evidence to determine whether the defendant was negligent in such shipping of tri solvent.

Plaintiffs' No. 6

The Court instructs the jury that the Hawaii Food, Drug and Cosmetic Act, of the Territory of Hawaii, provides that the causing of the sale, delivery or receipt in the Territory of Hawaii of feed which is known to be intended to be sold for cattle feed and which is unfit for consumption by cattle is prohibited. If you find from a preponderance of the evidence that Magnolia Soy Products

Company, hereinafter called Magnolia, was engaged in the business of manufacturing soy bean oil meal using the tri process, and that the defendant sold tri solvent to Magnolia with knowledge that Magnolia would manufacture such meal and sell the same in interstate commerce for use as cattle feed, and that the defendant knew, or by the exercise of due care should have known, that such meal when eaten by cattle was toxic to them, and that the defendant did not, before the meal involved in each suit was shipped to the Territory of Hawaii, adequately warn Magnolia that such meal might be toxic to cattle and did not label its tri solvent when sold to Magnolia in such manner as to indicate that such meal manufactured therewith would be toxic to cattle if eaten by them, and if you further find that the meal which was shipped from Magnolia was the proximate cause of the cattle deaths and illnesses claimed by the respective plaintiff or plaintiffs in the suit, such action on the part of the defendant would be a violation of the Hawaii Food, Drug and Cosmetic Act, and such a violation, if so found by you, would be evidence of negligence on the part of the defendant.

Plaintiffs' No. 7

The Court instructs the jury the proximate cause of an event must be understood to be that which in a natural sequence, unbroken by any new unforseeable intervening cause, produced that event and without which the event would not have happened.

Plaintiffs' No. 8

The Court instructs the jury that a new and independent cause is an intervening efficient force which breaks the casual connection between the original wrong and the injury. Such new force must be sufficient of itself to stand as the cause of the injury and be one but for which the injury would not have occurred. The term "new" refers to and means a cause incapable of being reasonably foreseen by

the original wrongdoer by the use of ordinary care on his part; and the word "independent" refers to and means the absence of the relation of cause and effect between the new cause and the original wrongful act or omission. And, unless the intervening cause is both new and independent, sufficient of itself to stand as the cause of the injury, breaking the causal connection, the original wrongdoer is not relieved from the legal responsibility for his wrong or negligence.

Plaintiffs' No. 9.

The Court instructs the jury that if you find that defendant du Pont induced Magnolia Soy Products Company (sometimes called "Magnolia" in these instructions), or the predecessors in interest of Magnolia, or both, to construct a tri-process mill for the manufacture of soy bean oil meal for sale as cattle feed, upon the representation by defendant that the tri-process would produce soy bean oil meal that would be fit for cattle feed and not toxic to cattle; and if you further find that the defendant was negligent in so doing; and if you further find that the damages to the plaintiffs were caused by the subsequent acts of Magnolia in manufacturing and selling such meal; then such subsequent acts of Magnolia would not be a sufficient intervening cause to discharge the defendant from liability for its negligence if:

(a) du Pont at the time of its negligent acts should have realized that Magnolia would so act; or

(b) a reasonable man, knowing the situation existing when Magnolia's acts causing the injury to plaintiffs took place, would not regard Magnolia's said actions as highly extraordinary; or

(c) Magnolia's acts which caused the injuries to plaintiffs were a normal response to a situation created by du Pont's conduct and the manner in which Magnolia acted was not extraordinarily negligent.

Plaintiffs' No. 10.

The Court instructs the jury that an intervening act of a third person, negligent in itself, is not a superseding cause of injury to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or (b) a reasonably prudent man knowing the existing situation when the act of the third person was done would not regard it as highly extraordinary that the third person should so act. Therefore, if you find from a preponderance of the evidence that the construction of the mill of the Magnolia Soy Products Company as a mill designed to use only the trichloroethylene process of extraction was negligently induced by the defendant through representations that the trichloroethylene process would produce soy bean oil meal fit for cattle feed; that the defendant sold tri solvent to the Magnolia Soy Products Company knowing that it was to be used by that Company to manufacture soy bean oil meal for sale in interstate commerce as cattle feed; and that the actions of the defendant prior to the sale of the soy bean oil meal which was ultimately purchased by plaintiffs and used in feeding their cattle, or prior to the time when they received the same in the Territory of Hawaii, were not such as would have caused a reasonably prudent man to desist from selling such meal for cattle feed, or were such that a reasonably prudent man in the position of the defendant knew or should have known that the said Company would continue to sell such meal in interstate commerce for cattle feed and would not have regarded sale of tri meal for cattle feed by said Company as highly extraordinary under the circumstances, then your verdict should be for the plaintiffs.

Plaintiffs' No. 11.

With respect to the claim made by the defendant that the acts of a third person (namely, Magnolia Soy Products Company) intervened between the commission of any act

or acts of the defendant that might be considered negligent and the actual occurence of the damages claimed by each of the plaintiffs, the Court instructs the jury that, if you find that a reasonable person in the situation of defendant would or should have realized that there was a realizable likelihood that said Company would act in a particular manner, and that this was the hazard or one of the hazards which made the defendant negligent in act or acts, then such intervening acts, whether innocent, negligent, intentionally tortious or criminal, does not or do not prevent the defendant from being liable to plaintiff or plaintiffs.

Plaintiffs' No. 12.

The Court instructs the jury that, where a manufacturer of an article knows, or in the exercise of ordinary care should know, that such article will be put to a certain use and that such use will create unusual hazards, there arises a duty on the part of such manufacturer to adequately warn all those who may reasonably be expected to be injured or damaged by a lack of such adequate warning. Whether any warning, if given, is adequate, is a question of fact for the jury to decide under all the circumstances. If, therefore, you find that a reasonably prudent person under the circumstances the defendant was in, would have warned not only Magnolia Soy Products Company but all classes of persons each of the plaintiffs was situated in, and no such warning was given by defendant to plaintiffs nor was any reasonable effort made by defendant to warn persons generally in such situation of each of the plaintiffs, such an act of omission is evidence of negligence on the part of the defendant.

Plaintiffs' No. 13.

The Court instructs the jury that the question of whether the letter of July 31, 1951, all plaintiffs' Exhibit No. 35, delivered by Stuart Armstrong to L. L. Ford and Lyman Reed of Magnolia Soy Products Company on or about Au-

gust 2nd or 3rd, 1951, was adequate notice to that Company so as to prevent the defendant from being liable to plaintiffs for any negligent acts (if you find that the defendant did commit such negligent acts), is a question of fact to be decided by the jury in the light of all of the circumstances as found by you. These circumstances may include any circumstances which you find would have influenced a reasonably prudent man in the same situation as the Magnolia Company in determining whether or not the situation required or justified his ceasing immediately to make any further sales of tri-processed soy bean meal for purposes of cattle feed, and may include circumstances and happenings prior to, at the time of, or a reasonable time subsequent to, the delivery of that letter and before the shipping by the Magnolia Company of any of the meal that caused the damage to the plaintiff or plaintiffs (if you find that such damage was caused by such meal). The question, so far as the Magnolia Company was concerned, is what a reasonable person would have understood the letter to mean under all of the relevant circumstances as so found by you.

Plaintiffs' No. 14.

The Court instructs the jury that where a manufacturer supplies an article which he manufactures or produces, to be used for a particular purpose under such circumstances that the buyer necessarily trusts to or relies upon the judgment and skill of such manufacturer to furnish an article of that type that is fit for the particular purpose, there is an implied warranty that such article shall be fit for said purpose for which it is to be used. There is also an implied warranty, under such circumstances, that the article is merchantable for such purpose.

Plaintiffs' No. 15.

The Court instructs the jury that the implied warranty of a manufacturer of fitness for a particular use or of merchantability for such use, is not only to the immediate

buyer of the article, but for the benefit of all persons whom defendant reasonably forsaw, or should reasonably have foreseen, might be injured if the product did not measure up to the quality as warranted and such party, if injured or damaged by such failure to conform to the warranted quality, may have a remedy for breach of warranty against the manufacturer.

Plaintiffs' No. 16.

The Court instructs the jury that if concurrent or successive negligence of two persons combined results in injury to a third person, he may recover of either or both.

Plaintiffs' No. 17.

The Court instructs the jury that the measure of damages for loss of or injury to cattle is the difference between the reasonable market value immediately before the injury or loss and the reasonable market values immediately after the injury or loss.

Plaintiffs' No. 18.

The Court instructs the jury that, if your verdict is in favor of a particular plaintiff, that plaintiff is entitled to damages, if any, caused by way of death of cows, calves, injury or damage to cows or calves, loss of profits, if any, loss of customers, if any, loss of good will, if any, reasonable cost of drugs and veterinary services, if any, other expenses, if any, reasonably and necessarily incurred in connection with and as a result of the illness or death of cows and calves, or in making reasonable efforts to ascertain the cause of the cattle illnesses and deaths, or to minimize damages, or to protect the herds and businesses of the respective plaintiffs, or any combination of said expenses, which damages, losses, and expenses the jury finds to have proximately resulted from or been caused by the defendant's wrongful act or acts.

Plaintiffs' No. 19.

The Court instructs the jury that, although these three cases, namely, (1) Nishida v. du Pont, Civil Action No. 142, (2) Sokei v. du Pont, Civil Action No. 145, and (3) Waldron v. du Pont, Civil Action No. 143, have been consolidated for trial, you are to bring in separate verdicts in each action. Forms of verdict will be handed you by the Court, in each action, for each count in that action, and you will render your verdict on each such count in such manner as the facts as found by you and the law as given you by the Court may warrant. The Court will now explain the reason for submitting to you several counts in each action. The Rules of Civil Procedure of this Court permit a plaintiff, when he brings a suit, to state his cause of action or claim in several different ways, so as to attempt to cover the various possible situations that he believes the evidence might establish. In this consolidated action, each complaint in each of the three cases was originally drawn with four counts, called Count One, Count Two, Count Three, and Count Four. The Plaintiffs have all withdrawn their Count Three, so that you should disregard that count in each action.

Count One, in each action, is a count drawn on the theory or claim that, by various acts claimed by plaintiffs to have been committed by the defendant, the defendant impliedly warranted that soy bean oil meal when manufactured or extracted by the use of trichloroethylene was fit and wholesome feed for cattle, and that the defendant breached or violated that warranty and thereby proximately caused damage to plaintiffs.

Count Two, in each action, is a count drawn on the theory or claim that by various acts claimed by plaintiffs to have been committed by the defendant, the defendant impliedly warranted that soy bean oil meal, when manufactured or extracted by the use of trichloroethylene (sometimes called "tri" in these instructions), was of merchantable quality

for cattle feed—that is, that it was of a quality fit to be sold for use as cattle feed, and that the defendant breached or violated that warranty and thereby proximately caused damage to plaintiffs.

Count Four, in each action, is a count drawn on the theory or claim that by various acts claimed by plaintiffs to have been committed by defendant, including alleged violations of the Federal Food, Drug and Cosmetic Act and the Food, Drug and Cosmetic Act of the Territory of Hawaii known as the Hawaii Food, Drug and Cosmetic Act, or of the said Hawaii Food, Drug and Cosmetic Act alone, the defendant was guilty of negligence and thereby proximately caused damage to plaintiffs.

Under the forms of verdict to be handed to you in each of the three actions, you may bring in a verdict on each count either in favor of the plaintiff or plaintiffs or in favor of the defendant, as the facts found by you and the law as given by the Court may warrant. If you find in favor of the plaintiff or plaintiffs on any particular count, you should determine the amount of damages which in your judgment, based upon the evidence and the instructions of this Court, will fairly and justly compensate the plaintiff or plaintiffs for the damage suffered by such plaintiff or plaintiffs and proximately caused by any wrongful acts of the defendant which you may find to have been committed.

Plaintiffs' No. 20.

The Court instructs the jury that, if your verdict is in favor of the plaintiffs, then the following rules will govern in computing damages, if any, which might be predicated upon any settlements or payments made by Fred L. Waldron, Limited, with or to the seven dairymen on the Island of Hawaii, the Territory of Hawaii in relation to alleged damages suffered on the Island of Oahu, and Hilo Dairy and Sokei Dairy:

(a) You are instructed that the contracts of Waldron with the respective seven dairies on the Island of Hawaii and that with said Territory of Hawaii, fix the amount of the damages to Waldron for those particular items, namely, the claims of said seven dairies and of said Territory, the defendant having stipulated, subject to its defenses claimed on the merits, that these amounts are reasonable.

(b) You are instructed that, in considering any damages suffered by Waldron, you should not include in any award to Waldron any amounts advanced by Waldron to Hilo Dairy or Sokei Dairy under the settlement contracts between Waldron and each of those dairies, Nishida Plaintiffs' Exhibit No. 15 and Sokei Plaintiff's Exhibit No. 15. Under these contracts, the Hilo Dairy and the Sokei Dairy are obligated under certain circumstances to repay such advances to Waldron, depending upon the amounts of their respective recoveries, if they recover against the defendant. Therefore, such advances should neither be included in any damages awarded to Waldron, nor deducted from any damages awarded to either Hilo Dairy or Sokei Dairy. In this way, double payments of any damages awarded can be avoided. However, if you find that the making of such advances was necessary and reasonable on Waldron's part under all the circumstances, and that the making of such advances caused a shortage of credit or working capital to Waldron and this contributed to Waldron's damages, you may take into consideration any such effects of shortening credit or working capital in computing Waldron's damages, though not adding the payments themselves to any verdict for Waldron.